IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-FIVE

JUNE 14, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,
Plaintiff,
vs
JAMES ARTHUR RAY,
Defendant

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R DARROW

TRIAL DAY FIFTY-FIVE

JUNE 14, 2011

Camp Verde, Arizona

REPORTED BY
MINA G HUNT
AZ CR NO 50619
CA CSR NO 8335

APPEARANCES OF COUNSEL:

For the Plaintiff:

YAVAPAI COUNTY ATTORNEY'S OFFICE
BY: SHEILA SULLIVAN POLK, ATTORNEY
BY: BILL R. HUGHES, ATTORNEY
255 East Gurley
Prescott, Arizona 86301-3868

For the Defendant:

THOMAS K. KELLY, PC
BY: THOMAS K. KELLY, ATTORNEY
425 East Gurley
Prescott, Arizona 86301-0001

MUNGER TOLLES & OLSON, LLP
BY: LUIS LI, ATTORNEY
BY: TRUC DO, ATTORNEY
355 South Grand Avenue
Thirty-fifth Floor
Los Angeles, California 90071-1560

MUNGER TOLLES & OLSON, LLP
BY: MIRIAM L. SEIFTER, ATTORNEY
560 Mission Street
San Francisco, California 94105-2907

Proceedings had before the Honorable WARREN R. DARROW, Judge, taken on Tuesday, June 14, 2011, at Yavapai County Superior Court, Division Pro Tem B, 2840 North Commonwealth Drive, Camp Verde, Arizona, before Mina G. Hunt, Certified Reporter within and for the State of Arizona.

P R O C E E D I N G S

(Proceedings continued outside presence of jury.)

THE COURT: The record will show the presence of Mr. Ray, Mr. Kelly, Ms. Seifter, representing Mr. Ray; and Ms. Polk and Mr. Hughes are here for the state.

This is the time to conduct the instruction conference. There wasn't a lot done last week. It was really the first that this material was presented in any detail. And the original draft that I had presented, I saw the defense respond. As I indicated, I haven't looked at that draft. That was just what people had given us. And this next draft I have looked at.

But I'll tell you, I've spent most of my time trying to research and look at law that would apply to a case that there is no similar case. What is the proper way to instruct? How does this concept of duty relate to this case?

But I have looked these over. I relayed to Heidi, and if she didn't tell you, I'll tell you. Just because something is in this set doesn't mean it's going to say. Because something is not in this set doesn't mean it's not going to be in

there.

But I do think that when you're dealing in the criminal justice system, the instructions are really designed to encompass the situations. There can be arguments within the parameters of the instructions, within those guidelines. The instructions have to cover appropriate arguments based on the relevant facts, the admissible facts, in the case.

Having said that, I would like to start right on page 1 and go through. I think that's the best way to do it. We get to a place where there is disagreement, we can take it up at that point.

If we can just start with this very rough draft on page 1. I'll ask the state to go first with any observations on this first page.

MR. HUGHES: Your Honor, we have no objections as to the contents of page 1.

THE COURT: Then defense?

MR. KELLY: I agree.

THE COURT: Page 2?

MR. HUGHES: No objection.

MR. KELLY: Agree.

THE COURT: Page 3?

MR. HUGHES: No objection.

MR. KELLY: Agree.

THE COURT: Page 4?

MR. HUGHES: Your Honor, the state does object to paragraph D, which is the Willits instruction.

THE COURT: Okay.

MR. HUGHES: Your Honor, the state did file a written response to defendant's request for a Willits instruction. It's the -- in this particular case there really is no lost, destroyed evidence or evidence which was failed to preserve which requires an instruction pursuant to the case law.

The only testimony in the case, Your Honor, has been that from the defendant's own witness, Dawn Sy, that she would not have recommended taking the entire sweat lodge. Given that, given the fact that the defense has to prove that that evidence could be material to its case, and the evidence that was seized was never even tested by the defense, there is no showing that the lost evidence could have been material to the defense.

And, therefore, the state opposes the giving of a Willits instruction.

THE COURT: I've read the pleadings on both

sides of the issue.

But, Mr. Kelly.

MR. KELLY: Judge, I, of course, would rely on our written pleading. And we believe the need for a Willits instruction is clear. I note that the State of Arizona cited the Bocharski decision in its response. And I know this court, as well as the Yavapai County Attorney's Office, is familiar with Bocharski.

If we use that case as an analogy, the entire crime scene, which consisted of a travel trailer, was towed from Congress, Arizona, to Quartzsite, where a veterinarian had cleaned the inside with some disinfectant before it was determined that the cause of death should be changed from an accident to a homicide.

And I believe the Arizona Supreme Court in that decision confirmed Judge Kiger's decision that a Willits instruction was, in fact, appropriate. And the reason I point that distinction out, Judge, is that in the Bocharski decision there was not this reasonable inference from the evidence that superseding, intervening cause, such as toxins, could have been the cause of death. It was simply the failure to preserve the

evidence, which may have in Bocharski found an alternate cause of death or alternate accurate cause of death.

In this particular case I remind the Court it's quite different than that briefed by the government in that there was an emergency medical provide or on October 8 who said could be carbon monoxide or OP poisoning. It was the Mercer testimony about the wood and rat poisoning. It was the DPS crime lab report showing an inert ingredient which may carry -- identified as 2-EH, which may carry a pesticide.

Importantly, it was the ER docs -- and they've been through all the exhibits -- who identified a toxidrome as a possible cause of death. And yet in the face of that evidence, the government in this case did not preserve the crime scene. They allowed the complete destruction of the sweat lodge within -- my recollection is within about 36 hours.

They also did not preserve the blood samples taken from the decedents, which would could have shown the presence of organophosphates or some other chemical. I would argue, Judge, that there is not a more clear case for the instruction as set

forth in the Willits case.

I don't want to reargue the entire brief. I know you have a lot to do, Judge. I think it's very clear. If you would like to hear some more, we can address the response filed by the State of Arizona. I would submit it's very clear that the instruction is required.

MR. HUGHES: Your Honor, if I can reply to what Mr. Kelly said. This case is a critical difference between this case and, for example, the Bocharski case. In Bocharski none of that evidence that was wiped down and destroyed was preserved. In this case there were four samples that were taken of the tarps and the materials in four different places in the sweat lodge. That's a critical difference.

That evidence is still there. It's never been tested. The defense has never shown through any witness that those four samples were deficient. That's the difference between this case and Bocharski. In Bocharski there wasn't even a single swab from the inside that might have had blood on it.

In this case we have multiple samples from inside the sweat lodge. We have multiple

samples of the soil. The medical examiners did preserve blood. And the testimony from the examiners was that at least half of that blood is still available to the defense for testing.

The other thing that Mr. Kelly points out, he says well, in Ms. Sy's lab report indicated that 2-EH. That lab report didn't come along until long after the sweat lodge had been surrendered. The medical records were not generated. Most of them have the generation date that refer to the possibility of toxidromes until after the sweat lodge had been surrendered.

And, again, under the cases cited, the Trombetta case, for example, that's cited in state's brief, the relevance of the evidence must have been apparent, readily apparent, to the officers at the time that they failed to collect it.

THE COURT: Mr. Hughes, I'm going to ask both counsel do this. But there appears to be three areas that the defense wants to obtain Willits instruction on. And I think it's the sweat lodge itself, the wood, and the blood, testing of the blood. And I'd like you to address if you see any distinction between those three areas.

MR. HUGHES: Your Honor, it's the state's belief that in all three areas the state did preserve what was available with the exception perhaps of Ms. Neuman. In that particular case Dr. Mosley testified that by the time Ms. Neuman died and came to his facility for him to do the autopsy, the blood that the hospital took some eight or nine days prior had already been discarded by the hospital.

The doctor testified that by the time she arrived in the -- at his morgue, the blood that she had in her body would not have been the same blood that was within -- that she had in her when she left the sweat lodge.

The other two decedents definitely had blood in their body because they went to the morgue directly from the hospital. And they were not in the hospital for a very long period of time since they arrived in the hospital in deceased manner.

So it is the state's position with respect to Mr. Shore and Ms. Brown, blood samples taken from the time were immediately preserved. With respect to Ms. Neuman, the blood that was available at the time she died was also preserved.

And with respect to the wood, samples of

the wood have been taken. The only wood that there has been any testimony that was burned in this case was the D logs. And the D logs -- several of the D logs were seized. The only other wood that was present was the structural support beams. Those were seized and samples were available.

And then the tarps and the blankets were also seized and made available.

The defense is attempting to analogize this case to a case where nothing was seized. The issue here is was enough seized. And without any form of testimony that enough was not seized, the defense has failed to meet the Fulminante test, which is the two-prong test cited in the briefs.

THE COURT: Mr. Kelly, if you see any distinction between those three areas, I'd like to know.

MR. KELLY: Judge, I believe a Willits is required for those three areas as well as the soil samples.

THE COURT: I was including that really within the lodge, an aspect of that.

MR. KELLY: Then I see no distinction, Judge. Willits would apply equally. The way it is proposed and drafted on page 4 is consistent with

13

my experience as to how the jury would be instructed, leaving it up to the attorneys to argue the inference from the instruction set forth on page 4.

I believe that's the RAJI, the correct RAJI. And we would not go further to define you may only consider these particular areas. That's been my experience.

And, Judge, I must reply. In Bocharski -- it was my case -- there is a partial print of the defendant identified by the government after they had destroyed the crime scene. And the reason of Willits is given is due to the fact that there is lost, destroyed or unpreserved evidence from due-process concerns, prevented a defendant from finding potentially exculpatory evidence.

What I was attempting to point out in this case is we actually have some very strong leads pointing towards potentially exculpatory evidence, whether it's the sweat lodge, the wood, or the blood. And true. Ms. Neuman's autopsy took place days after the transfusions. However, that does not excuse or somehow prevent the State of Arizona from obtaining a blood sample during the initiation of her medical treatment, or the other

14

critically ill patients, which may have shown the presence of toxins.

Finally, Judge, the fact that timing is somehow an excuse is not relevant in a Willits determination because, as this court is aware, Detective Diskin could have received a more rapid verbal response as to the DPS crime lab results. He could have went to the Flagstaff Medical Center or Sedona or Verde Valley and interviewed the doctors. He could have gathered the wood on the scene after the discussion with Ted Mercer. He could have done all of those things.

And, most importantly, if you recall his testimony, Judge, Detective Diskin suspected toxins. That was his testimony.

And so the reason I point out the case of Bocharski is that that's a situation are where a partial print identifying Mr. Bocharski as an individual who entered the small camp trailer of the decedent, Freida Brown, was discovered by the state.

But the Willits instruction was given on the fact that the remaining portion of the potential evidence -- no one knows what it could have been -- may have exculpated Mr. Bocharski.

15

And that's quite different in this case where the detective himself recognized that possibility. A government employee or contract employee in the EMS provided suspected organophosphates -- the treating physicians, the medical examiners. And yet nothing was done to preserve that evidence.

And I would argue, Judge, hypothetically, that had it been preserved and had the blood shown the presence of organophosphates, this case may have taken a completely different turn. And that's the very premise upon which Willits is based.

THE COURT: Mr. Kelly, what testimony or evidence was there that the wood somehow could have contained toxins?

MR. KELLY: Judge, if I misstate the evidence, forgive me. But I believe that medical examiners, as well as Dr. Paul, possibly Dr. Dickson, testified about the CCA, which is a chemical contained in treated wood. And I do recall this clearly now. Mr. Hamilton took the witness stand and said, based on his training and experience, none of his wood was treated.

That, Judge, alone would be a sufficient fact upon which to gain a Willits instruction. If

16

there is an implication from the State of Arizona provided to this jury that the wood, in fact, was not treated, based on Michael Hamilton's testimony and the fact that the detective failed to gather a portion of that wood for testing by laboratory, is a relevant determination.

And in addition to -- and if I misstated the expert witness testimony, I apologize. But I believe a couple of them talked about CCA. However, I know that Ted Mercer said, it's the wood is different this time. You heard the testimony.

And then the state presented the testimony of Michael Hamilton that said, it couldn't be the wood because I don't use treated wood.

And so given the fact that those are the reasonable inferences that the jury may draw, I believe a Willits instruction would be appropriate. Or actually, I believe this Willits instruction is appropriate. But I believe it would be appropriate for Mr. Li to argue that in his closing.

THE COURT: With regard to testing coverings or testing the flooring, which is the dirt, sand, under the lodge, what's the evidence and testimony that that would have had any effect given what

happened at the scene? what was done immediately with people? Where is the evidence that that would be anything other than speculation that it might have made a difference to have those?

MR. KELLY: Judge, with all due respect, I submit that it's a great deal more than speculation for two if not more reasons. First of all, less than 1 percent of the coverings tested by the Department of Public Safety crime lab. And on one of those samples was the 2-ethylhexonal, which can be the inert ingredient which is used to carry organophosphates, consistent with the medical examiners and doctors' opinions. So that's a critical actual fact in this case.

In addition to that, Judge, we have testimony from Fawn Foster, somewhat surprising testimony, that a granular substance, AMDRO, was discovered in the shop -- which is an organophosphate or may be an organophosphate.

I can't say that there is direct evidence of that, but we had a lot of testimony about its purpose as a pesticide, that it's granular in nature, which, coincidentally, fits the description of Ted Mercer of the purported rat poison in the pump house, which he describes as granular, not the

critter biscuits described by the Hamiltons and Foster.

So there is a reasonable implication that that type of ant poisoning could have been used on the floor of the sweat lodge in the sealed environment where you had heat and humidity, consistent with Dr. Paul's testimony, then could have -- cannot rule out the possibility of organophosphates caused the death. Those are two that I can think of right now.

And, Judge, I think it relates back to the very purpose of a Willits instruction. And that is the inquiry is did the state destroy evidence that is potentially exculpatory, period? That's the inquiry. And it's not requiring the defense to prove a negative. And that's, essentially, what you've asked me to do.

THE COURT: No. I'm asking for what the evidence would be that preservation could have accomplished something in those various areas.

MR. KELLY: And I think the clear response to that, Judge, is had the State of Arizona submitted the blood samples from the decedents within the critical time limit provided by Dr. Paul and the other medical examiners to determine the presence

of organophosphates, we would have known whether or not that was a contributing factor.

When you say, organophosphates, the reason that is such a pointed inquiry is because of the EMS provider, the toxidrome reference by the emergency room providers, the 2-EH found by the crime lab, and the symptomology described by Dr. Paul during his testimony. And that's why it points that direction. And that's why a Willits on that particular issue is critical.

And I'd, emphasize, Judge, that I find it interesting that two medical examiners employed by the State of Arizona, and every homicide case I've ever tried are the state's primary witnesses as to the cause of death, cannot rule out organophosphates.

So to answer your question, the argument is that -- and then we have Detective Diskin, who suspected that as a possibility. A simple telephone call to the medical examiners would have preserved that blood for testing. That failure is exacerbated by the fact that despite the request from the DPS crime lab, simple soil samples may have detected the presence of organophosphates.

Given the fact that 2-EH was found on

less than 1 percent of the samples provided, a greater sampling could have confirmed the suspicion. In regards to the wood itself, it's a different chemical, I would submit, Judge, something other than organophosphates.

THE COURT: Mr. Hughes, I'm going to hear from you. Remember I wanted to talk about the Willits last week. I saw that as a major, important thing to be dealing with. We got to the end of the day and talked about scheduling. That was important too, of course.

Mr. Hughes, what I'd like you to reconcile, and I've had questions about this test right on through for a number of years. On page 4 of your brief, that's where you set out the State v. Fulminante two-part test. How do you really resolve the first part that says, doesn't preserve material evidence that was accessible and might tend to exonerate? And then part two, prejudice resulted. How does the -- in what sense does that second part, how does that apply -- how does the defense do that? If they only have to show that it might exonerate, you're saying they have to turn around and say it would exonerate?

MR. HUGHES: Your Honor, the defendant's

claim -- I think the distinction between the two is what's explained in the Dunlap case that the state cites on page 6, which is that if the defendant's claim that they destroyed or lost evidence would be exculpatory, if that's speculative, then they don't get a Willits instruction. That's the difference between the two. One, that the state failed to preserve evidence, and, two, prejudice resulted.

If it's a speculative claim, no prejudice can result. And that's precisely what occurred here. Evidence was preserved with each of these items -- of the rocks; of the soil; of the tarps; of the blankets; of the D logs, that the testimony has been was the only wood that was burned; of the upright support, and of the blood and tissue samples of the decedents. All of that was preserved.

The defendant is arguing for a Willits instruction apparently on the basis that the state didn't preserve enough. That's the speculative nature of their claim. There has been not an iota of evidence that's been presented in the form of any of the experts who have testified that the samples were not sufficient samples, other than perhaps the blood sample, which Dr. Paul testified

organophosphates can disappear within hours or days of a person's ingestion due to metabolization.

In that case, then, you have to look to that Trombetta case. Was the blood samples, which could have disappeared very quickly due to metabolization -- was that something that should have been readily apparent to the officer at the time they failed to preserve?

And it -- certainly the medical examiners themselves didn't preserve that, those tissues. The medical examiners were trained people in the area and didn't see a need to send it off for some sort of testing. It stretches the imagination to say that the detectives should have recognized something -- flaw by the medical examiners.

THE COURT: Mr. Hughes, I need to get to this point right then. At what point does the evidence show that the medical examiners were told of a concern at the scene, at least raised? Again, it was just a possibility of organophosphates. When were the medical examiners first told that?

MR. HUGHES: Your Honor, I'm not sure they were until shortly before trial. But they were told that an unknown person said the words, "we think maybe it was carbon monoxide or maybe" -- I

think they used the words "we think it was carbon dioxide or maybe organophosphates maybe," something along those lines.

That, Your Honor, is not a sufficient fact to point the detective or the medical examiners down the road towards organophosphates, the fact that an unknown person said that in the background during the night in question.

And even the medical doctors who had concerns about toxidromes -- none of them tested the blood for organophosphates in the very patients who were in the hospital. They treated the symptoms, but they didn't test any of the blood. There has been no evidence that they tested any of the blood, because it didn't happen, for organophosphates.

And then we're left with the evidence that was adduced, that this substance that could be in the blood can disappear within hours or days. That's where you turn the issue on testing of blood into a speculative nature. There has been no showing by the defense's expert that within a few hours there would have been anything left to test.

Their own expert says within hours or days it could have been metabolized and gone. That

on the blood issue alone makes that a speculative claim for the defense to say, well, if you had taken the blood the next day at the hospital, if the officers had gone in with a warrant or something for that blood -- that's precisely the speculative nature. The very testimony is it could have been metabolized at that point in time.

And then with respect to what Mr. Kelly raised about the tarps and the wood, again, all of those are were tested. And all of those were preserved. There has been no evidence that the number of samples is lacking. The defense has gone to exercises of math to show it was a fraction of the total that was taken. But they've never presented through their witness or a state's witness that the samples that were taken were not representative of the whole or were not sufficient with respect to the rocks, the soil, the wood, the tarps, and those sort of thing.

All the evidence has been from their own witness, Criminalist Dawn Sy, who said I wouldn't have recommended that they take the whole structure.

I don't know if that addresses the Court's concern.

THE COURT: I still have a problem between the two parts of the test. One part says just have to show something might exonerate, and the other part says show prejudice. So I was just looking for some help on that distinction.

MR. KELLY: Ms. Seifter has --

MS. SEIFTER: Thank you, Your Honor. It is a tricky trial question. But I do think the case law bears out an answer. And I think the distinction can be seen in contrasting Fulminante with the Hunter case. And both of these cases are discussed, I think, in both party's briefs.

In the Fulminante case there was a failure to preserve the contents of the victim's stomach. And I don't remember what the alleged ingredients were. But, basically, it didn't matter if she had chicken or beef. It wouldn't have helped the defendant's theory of his defense no matter what the contents were.

In the Hunter case some scissors had been wiped off. And the defendant didn't have any evidence that the victim's fingerprints were on the scissors. He couldn't -- as the case discusses, the whole point of the Willits is he can't show what would have been on the scissors. But the

Court noted that if the victim's fingerprints had been on the scissors, that would have corroborated his defense.

So I believe that the prejudice inquiry is if this evidence were what the defendant's -- you know -- what the defendant's theory suggests it might have been, would that corroborate his theory or would it, essentially, be irrelevant? That is my reading of Fulminante and distinguished against the Hunter case. I think that's what the prejudice addressed.

In emphasizing that, it would be difficult for it to be anything else because the evidence is gone. And were it the case, as we know in our brief, that a defendant could actually establish that prejudice in fact, in other words, that the evidence did contain what the defendant -- what would be exonerating to the defendant, that enters a different line of cases where dismissal would be required. I think that's the distinction.

THE COURT: Just seems there would be very few cases where someone is going to suggest evidence wasn't preserved and -- but we don't know that that really helps us or not. They usually have a theory to go with them.

MS. SEIFTER: It does appear to be raised anyway.

THE COURT: It can be. There might be something there that should have been saved. We don't know what.

Well, I'll tell you right now, I've gotten some cases to read. I'm inclined to give the Willits. I'm not convinced this should be a distinction. There shouldn't be a distinction between the different types.

Mr. Hughes, you didn't think there should be any distinction, either Mr. Kelly. You both presented it to me as an all-or-none type of situation.

MR. HUGHES: I would agree with that, Your Honor.

MR. KELLY: I agree.

THE COURT: So I'll accept it at that. I'm saying at this point I'm inclined to do that. You should probably plan your closing accordingly. But I will go ahead and look at a couple of these cases again.

Anything else on page 4, Mr. Hughes?

MR. HUGHES: No, Your Honor.

MR. KELLY: No, Judge.

THE COURT: Page 5, Mr. Hughes, Ms. Polk?

MR. HUGHES: No objections to page 5, Your Honor.

MR. KELLY: Looks good.

THE COURT: Page 6?

MR. HUGHES: Your Honor, with respect to what's on the top of six, which I suppose technically also would be part of the bottom of five, the -- that paragraph we believe should include omissions by the defendant. I know this is probably going to get into something that's not in the instructions at all but the state has requested, which is the giving of the duty instruction.

THE COURT: And I'll say right now, I do think there should be a duty type instruction in there. It would go there. So let's hold that part of the discussion.

MR. HUGHES: Other than the lack-of-omission language in that, Your Honor and -- there's no further objections to page 6.

THE COURT: Mr. Kelly, again, we'll reserve on page 5 for argument the whole concept of duty and that.

But getting on to page 6.

MR. KELLY: Judge, on page 6, paragraph C, the culpable state of mind is recklessness. I'm not sure the applicability of motive.

THE COURT: Typically see it in homicide cases. It's a general instruction.

Mr. Hughes?

MR. HUGHES: Your Honor, the state had asked for it. I think it is supported by the law in Arizona that the giving of a motive instruction in a homicide case is appropriate, particularly in a case like this where there is -- you don't have a typical homicide like you might have where someone is holding up a liquor store and the clerk gets shot, it's clear what a motive may be.

In this particular case the state would like to argue motive and believes that it's appropriate instruction on the law.

THE COURT: What particular element or factual aspect of the case would it go to?

MR. HUGHES: Your Honor, it's the state's belief that the defendant's motive in running the sweat lodge ceremony was to take people to this altered state, this altered mental state. This goes kind of hand in glove with the argument I was making last week. If the defendant wanted to get

them to the altered mental state, the testimony has been from the experts that the altered mental state is the hallmark stage where you move from heat exhaustion into heat stroke.

It's the defendant's intent, then, or motive to move them that fine line on the continuum from where they would be heat exhausted into heat stroke. That's the state's intent in arguing motive.

THE COURT: I understand the logic of that argument.

Mr. Kelly, if you would address that, please. And what would really mean a lot to me as a case from any jurisdiction at the appellate level that would indicate that when you're not dealing with an intent offense specifically, motive would perhaps confuse the jury or something. Because I do see the factual logic in Mr. Hughes's argument anyway.

MR. KELLY: Judge, I cannot cite a case as I sit here. Here's the problem with Mr. Hughes's logic. And I refer to page 2, paragraph D. An expert witness should be judged -- expert opinion testimony should be judged just as any other testimony. And what the actual factual testimony

in this case, I would submit, as it relates to altered states -- and this starts with one of the original witnesses. I believe Melissa Phillips testified that an altered state can include such things as love, anger, disappointment, frustration.

And I think it's clear from the evidence that is presented in this case, and what I'm talking about is Exhibit 141, as well as other very limited testimony attributing statements to my client, those are the types of altered states he was speaking of, not the altered state as described by medical examiners and experts.

Mr. Ray had no basis, he has no medical knowledge, to opine in a presweat lodge presentation that his altered state is based on a physiological physiology of human beings. That's just not the case.

What he was saying are exactly what his words in Exhibit 141 speak of, and that is the altered state that all these folks were trying to achieve. And so that cannot be his motive.

And we've made this argument. A person who is running a business just simply cannot have a motive of bringing participants to the brink of death or killing them. Because you wouldn't have a

business. It's absurd. And motive in a homicide case relates to intentionally or knowingly engaging in a result.

THE COURT: There is a knowing aspect in a manslaughter case too.

MR. KELLY: True. But in this case it's the awareness of whether or not his conduct as defined by the manslaughter -- it's reckless.

THE COURT: Again, it's not an instruction you would see normally outside an intent kind of offense where there is an explanation to why someone specifically does something. But in this case there is logic. I see the argument. Mr. Kelly argues that it's not logical and argues in stronger terms that those may well be matters of argument.

Mr. Hughes, again, it would really help me to see if there is an issue with giving this kind of instruction, if it's a misuse of the instruction to use it somehow.

MR. HUGHES: Your Honor, I think the instruction is a fair statement of the law. In the RAJIs they cite two murder cases where obviously the intent is an element, that they explain that the presence or absence of motive in a murder

prosecution in a proper motive instruction should be given upon request. They make it clear that although motive is not an element, it's something that the jury can consider.

In a case like this where mens rea is an issue, any mens rea is an issue. Motive is relevant for a jury to determine in determining what the defendant's mens rea is.

Mr. Kelly, I think, is correct in the argument that no businessman wants to kill his customers. But that doesn't mean that that's -- we're not arguing with respect to the motive that Mr. Ray wanted to kill his customers either. But he did want to and had an incentive for people who paid $10,000 to take them at the cumulation of all the entire week -- to take them and give them the sort of the granddaddy of all altered mental states.

And that's what we're arguing is his motive in this case. Because mens rea is an issue, it's the state's belief that the motive instruction, which correctly states the law, should be given.

THE COURT: Mr. Kelly, anything else on that?

MR. KELLY: Judge, I just want to make sure

the record is clear that we object to instructing the jury with this motive instruction. And I believe I've provided a sufficient factual basis for that objection.

THE COURT: Okay. I'll say, as I did with the Willits, I'm inclined to give that. I'm going to look at some law. Would certainly welcome that. But I'm inclined to give that.

Did we cover -- then anything else on that page?

MR. HUGHES: Your Honor, with respect to the last instruction, I believe there is a typo as it carries over onto page 7.

THE COURT: Okay.

MR. KELLY: I agree.

THE COURT: It's probably --

MR. HUGHES: Where it references --

THE COURT: Right. It has to be the lesser included. That is a typo. It goes right into the elements for the lesser included also. So it should be negligent homicide. You cannot find guilty of negligent homicide unless you find the state has proved -- okay.

Where is the typo?

MR. HUGHES: Your Honor, as written, it ends

with, unless you find the state has proved each element of manslaughter beyond a reasonable doubt.

THE COURT: Right. And that's what I crossed out. Yes. Absolutely.

MR. KELLY: I agree, Judge.

THE COURT: Yes. So it will read, unless the state has proved each element of negligent homicide.

Okay. Then anything else on page 7?

MR. HUGHES: Your Honor, it appears at this point the instructions are moving into the instructions that are not the general but the specific to the crime. At some point we would ask that the Court include the flight or concealment instruction that the state requested.

And I don't know if this is the time. It's something that's not in there. But at some point I would ask that in the portion of the instructions that deal with the general analysis of the evidence, that the -- an instruction on flight or concealment, which is RAJI standard No. 9.

THE COURT: Let's get through this and get the basics done, what's agreed upon, what we can deal with right now. And I'll just add that to -- there is also the -- what I've indicated. I don't have

anything with regard to duty, and I think something should be in here with regard to that. But that's open to discussion. Let's take that up a little bit later, Mr. Hughes.

MR. HUGHES: Other than that I have no other changes for page 7.

THE COURT: Mr. Kelly?

MR. KELLY: Judge, I do have several changes, more form than substance. If we began with B(2), fail to recognize a substantial and unjustifiable risk of causing the death of another person. I would submit, Judge, that it should mirror the manslaughter definition, paragraph 6(2). Thus it would read as follows: Fail to recognize a substantial and unjustifiable risk that his conduct would cause the death of another person.

THE COURT: And my guess is the RAJI reads this way, and that's the way Diane did it. But -- normally I agree. Things ought to be parallel, and you shouldn't be changing the phrases between instructions. So I think it should be consistent one way or the other.

MR. HUGHES: Your Honor, I would agree. As written, I believe it mirrors the RAJI word for word. Mr. Kelly requests the conduct. If there is

the duty issue, it should say conduct or omission.
THE COURT: Except -- let's look at 13-105, which says --
Mr. Hughes, I would think that's perhaps why the distinction is in there between negligence or not, because of the possibility of not having a positive voluntary act and having an omission instead. That could be the reason. What I'm looking for is the definition of --
MR. KELLY: Conduct, Judge, under 13-105.6?
THE COURT: That's what I -- means an act or omission. That's why it's covered. Because "conduct" means either one. So as long as that definition is in there, I think, it should be parallel.
MR. HUGHES: If the definition is for -- Your Honor, my understanding, there will be a definition for "conduct." As written -- as written, it says, causing the death. And a jury can infer from that use of the word "cause the death," it's act or omission because they will have "conduct" defined.
But Mr. Kelly's proposed language doesn't use that word. It uses the word "act." And that specifically limits it or could limit it in the

eyes of the jury to only one half of what the law permits, which is the act and not the omission.
MR. KELLY: Judge, that's simply not true.
THE COURT: I think you said conduct.
MR. KELLY: Right.
THE COURT: I think that's right. And I'm going to put it that way because I do think there is going to be that definition of "act or omission" going in. So I'm going to conform that, Mr. Kelly, to your suggestion, which is just --
And, Mr. Hughes, which you're not objecting to now. At least --
MR. KELLY: To answer Mr. Hughes's question, it would read, a substantial and unjustifiable risk that his conduct would cause the death of another person, consistent with the definition provided for manslaughter.
THE COURT: Okay. All right.
MR. KELLY: Judge, I believe the next -- I'm sorry. Not the next paragraph but the following paragraph beginning with the distinction between manslaughter and negligent homicide.
THE COURT: Yes.
MR. KELLY: I believe it is also not correct. First of all, the first insertion, I would submit,

is in the third line. And it should read, for manslaughter the defendant must have been aware of a substantial risk -- substantial and unjustifiable risk. They left out the end "unjustifiable."
THE COURT: Does somebody have a hard copy of the RAJI available?
MR. HUGHES: I have it in front of me, Your Honor.
THE COURT: It would help.
MR. HUGHES: Reading from the RAJI, the RAJI states the distinction between -- and I'm referring to RAJI 3rd, which is on page 103. The distinction between manslaughter and negligent homicide is this, colon: For manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that his/her conduct would cause death. Negligent homicide only requires that the defendant failed to recognize the risk.
THE COURT: That's the 2010 supplement? Because that's -- that's hard to find. That's not widely circulated. Are both of you working off of the 2010 supplement?
MR. KELLY: No. I believe we're working off --

MR. HUGHES: Your Honor, we have a 2010 supplement. However, the supplement that we have for 2010 supplements a number of the other sections. Actually, I take that back. We do have a supplement for negligent homicide. And on that supplement -- I will read it. It says, the distinction between manslaughter and negligent homicide is this, colon: For manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that his/her conduct would cause death. Negligent homicide only requires the defendant failed to recognize the risk.
THE COURT: That's exactly what's in --
MR. HUGHES: And appears to be the same.
THE COURT: -- the text here. I wonder why would they leave out part of the definition.
MR. KELLY: Judge, our request is that the definition be included, substantial and unjustifiable risk.
THE COURT: Mr. Hughes?
MR. HUGHES: Your Honor, the state would have no objection to including "and unjustifiable" after the word "substantial."
THE COURT: I think someone should -- well,

I'm not going to be presumptuous. It just should mirror the language of the statute.

So what other -- is there any other language that doesn't track the statute?

MR. KELLY: Yes, Judge. The next sentence. And I believe it should read, negligent homicide requires that the defendant failed to recognize, and then consistent with the definition, a substantial and unjustifiable risk that his conduct would cause the death of another person.

THE COURT: Mr. Hughes?

MR. HUGHES: Your Honor, I think that's inferred by the language that's used, which is "recognize the risk." That reference to risk comes directly after the reference to what will be substantial and unjustifiable risk.

MR. KELLY: Judge, I believe what I've read is the law. And that would be our request. And also the emphasis that negligent homicide only. I don't know why they included that. The definitions are important.

THE COURT: The goal is to make them as clear as you can in accordance with statutes, true to the statutory meaning. Yeah. I don't know anywhere in the statute where it says, "only." I don't know

why that language would be added.

So I'm going to make the language consistent. The negligent homicide requires that the defendant failed to recognize a substantial and unjustifiable risk that his conduct would cause death. That's what the law is.

Anything else on seven?

MR. KELLY: Nothing else, Judge.

THE COURT: Mr. Hughes, anything else on seven?

MR. HUGHES: Your Honor, may I have just a moment?

THE COURT: Yeah. Just because we move on doesn't mean we can't go back. I want to make sure everyone has enough time to look at this and make a record.

MR. HUGHES: Your Honor, with respect to the manslaughter definition on page 6.

THE COURT: Okay.

MR. HUGHES: Paragraph 2 as currently written or with -- as currently written would read, was aware of and showed a conscious disregard of a substantial and unjustifiable risk that his conduct would cause another person's death.

THE COURT: Okay.

MR. HUGHES: It's the state's belief that the language in the RAJI which actually tracks, it's the state's opinion, the statute, should be used, which the RAJI states, was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death.

Your Honor, when you look to the statute in particular, the reckless statute, it talks about unjustifiable risk of the result that is the -- that the crime makes a crime. In this case that result would be death. So that case the RAJI correctly sets forth the language of the statute.

MR. KELLY: Judge, I think the problem is simply this: Without conduct you can't have a crime. And the case law discusses the interpretation of the RAJI as the result -- excuse me. Discusses the interpretation of the definition of "recklessness" and then thus the result of this jury instruction.

MR. HUGHES: Your Honor, paragraph 1, though, is very clear, addresses the conduct concerned, accurately sets forth that defendant, one, caused the death of another person.

MR. KELLY: Judge, that's incredible blurring between civil and criminal law.

THE COURT: I'm wondering how "conduct" got in these instructions if it's not right out of the RAJI. Because normally that's what my JA does is just take the RAJI.

And I -- but you're saying the RAJI doesn't read like that.

MR. HUGHES: Your Honor, as I read the RAJI, I'm unable to find a supplement that's changed it. The language is as I read it, which is No. 2, was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death.

THE COURT: Hang on just a minute, please. I want to check something. I'm looking at the definitions under 13-105 of "reckless" and "criminal negligence." And for "recklessly" they incorporate "conduct" through standard of conduct, talking about conduct.

Criminal negligence doesn't do that. It talks about a gross deviation from a standard of care, if you want to look carefully at the definitions.

So when you look at the manslaughter, it says, recklessly causing the death of another, you're going to have to bring in a definition of "recklessly." And at some point the concept of

conduct as either an act or omission comes in there. It just does. But, I mean, these RAJIs have been around, and I prefer to use the RAJI.

Ms. Seifter, I'm sorry. I wanted to read those definitions.

MS. SEIFTER: In answer to the Court's question, I don't know if this is how the definition of "manslaughter" got into the Court's draft. But I believe at some point the defense did request this wording, which we found was used as the definition, the standard definition, of "manslaughter" in maybe a dozen cases, in other words, incorporating that it has to be the defendant's conduct.

And the concern is just that if it's left vague, it could be understood to mean that if there is just sort of generalized risk, that the defendant could be liable, which is, of course, not the law. So we wanted it to be clear and consistent with the law.

MR. HUGHES: Your Honor, again, I believe Subsection 1, which correctly states the law and tracks language of the RAJI, addresses that concern. The RAJI language, No. 2, which is different than the proposed draft, basically, reads

virtually word for word what is in 13-105, which is is aware of and conscious -- reading from 105. The person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exists. In this case the result for manslaughter would be death.

And then the language below that starting with, the risk must be such that disregarding it was a gross deviation. In the proposed instructions it also appears to be correct. It comes directly from the following sentence of the 13-105(c) -- 9(c).

MS. SEIFTER: Your Honor, if we may respond just briefly. The connection that we were trying to incorporate, as the Court just noted, is that it's recklessly caused. But if you do not include a reference to conduct, then you just have recklessness and awareness of a risk. My apologies. Causation and awareness of a risk without them being tied together clearly.

I understand Mr. Hughes says it's an available inference. But we want to make it clear, not inferential.

THE COURT: Mr. Hughes, what is the clearest

way to do this? That's what's most important. What's the clearest way for this jury to understand what the law is and what they have to apply? That's the primary concern. RAJI's can be completely wrong. And every now and then an opinion comes up and says no. That's not how it should have been. So we don't have to be wedded to that.

MR. HUGHES: I realize that.

THE COURT: Which is clearer?

MR. HUGHES: Your Honor, I believe the RAJI is clear because it tracks the language of the statute nearly verbatim. The only difference is it inserts "death," instead of what the statute uses, which would be "the result." Other than that, the RAJI language tracks the statute most precisely. I believe it would be the clearest.

I would agree that RAJIs are a useful starting point, but they're not unduly persuasive as far as the giving of an instruction.

THE COURT: When you have a statute that says, recklessly causes something, you've got to get back to the definition of "reckless." You can't build an instruction just from the statute, Chapter 11. You can't do it. When you get back into the

definitional part, and the definition of "recklessly" uses the word "conduct."

The other way to do this is to -- you see people instruct this way sometimes too. You instruct on the statute as it is and then defined, so the jury has to go looking elsewhere for the definition of "recklessly." I think that's unfortunate to have the jury have to jump around through instructions to figure out what the law is.

MR. HUGHES: I agree, Your Honor. This instruction does in Paragraph 2 of the RAJI and then the following paragraph does incorporate into the instruction the mens rea from 13-105. Paragraph 1 incorporates in the conduct requirement.

THE COURT: Okay. All right. You know -- then let me ask this, Mr. Hughes. And you and Ms. Polk were talking about the specific language. The revisions that were made so far, middle of page 7, with regard to making the distinction. Do you agree it should stay as revised even with -- even if the RAJI language were used in the substantive instruction -- you know -- the elements part?

MR. HUGHES: Your Honor, with respect to the

revisions that we talked about for the -- that paragraph starting the distinction between manslaughter, the state has no opposition to the revisions that we discussed a few minutes ago.

THE COURT: Then I'm going to --

Mr. Kelly, any final thing on that?

MR. KELLY: No. I was just wondering, Judge, if it's not the defendant's conduct at issue, whose conduct would it be? And the way this is proposed on page 6, paragraph 6, subparagraph 2, makes it more clear for the jury.

THE COURT: Okay. You know, I'm just going to pick. I'm going to decide which is clearer. I do think that that revised language would do it with the language in the RAJI, though. I mean with the agreed revision. So I'll just look at that. It doesn't really change anything. The parties can argue the facts.

Anything else on seven?

MR. KELLY: No, Judge.

MR. HUGHES: No, Your Honor.

THE COURT: Okay.

Mr. Hughes, on page 8 -- I've got to ask something. Where does -- looking through this, where does intentionally and knowingly come in?

What elements?

MR. HUGHES: Your Honor, I suppose they would come in for an argument of the included mental state. In this particular case for -- to argue a greater mental state, the jury needs to know what that -- what the greater mental state is in order to interpret the necessary -- the necessarily included mental state instruction, which is being given.

THE COURT: Is there anywhere in the law that intent is in any of the -- and of that, though? There is the included part of -- included mental state, criminal negligence. That runs over from seven and eight.

With regard to intent, once again, it could just be something confusing for a jury to say where was intent in all this? Why did we need to know that? And I'm just trying to think through it, if there is a reason it should go in there.

MR. HUGHES: Your Honor, the reason would be the included mental state instruction correctly instructs the jury -- if the state is required to prove the defendant acted with criminal negligence, that requirement is satisfied if the state proved acted intentionally, knowingly, or recklessly.

In this particular case for negligent homicide, the state could prove the mens rea elements by proving intentionally, knowingly or recklessly. The jury needs to know what those three terms are.

THE COURT: Correct. I understand your argument.

Mr. Kelly?

MR. KELLY: It should be stricken. That's why I've always done it. It should read, proved the defendant acted recklessly. In other words, negligently is included within the definition of "recklessly." It's all you're trying to tell the jury. There is no facts in this case. There is no allegation. There is no implication. There is no argument that my client acted intentionally or knowingly in causing the death of the person.

So we would object and ask that the language be of included mental states, criminal negligence, re defendant acted recklessly, and then strike paragraphs E and F on page 8, the definition of "intentionally" and "knowingly."

That doesn't preclude anyone from arguing that there's a difference between intentional and premeditated first degree murder and manslaughter.

It's just simply there is no basis for definition of "intentionally" or "knowingly" in this case. There is no allegation.

I searched every aspect, and I don't see any instruction in here that requires some definition of a culpable mental state of "intentionally" or "knowingly."

THE COURT: Mr. Hughes?

MR. HUGHES: Your Honor, with respect to the criminal negligence, included mental states, as I said before, if the state is to be able to argue that the defendant acted knowingly, the defendant -- the jury needs to know what that definition of "knowingly" is. And also they need to know the definition of "recklessly" to determine if they -- if the state has proven -- of course, in that case, if we've proven he's acted recklessly, presumably they'd return a verdict on the manslaughter charge.

MR. KELLY: Judge, I'm going to say something very simple. And that is if the state argues that my client acted knowingly, that would be reversible error because we've not been provided any notice of second degree murder. The allegation in the indictment is reckless.

53

THE COURT: Mr. Kelly, I think the state can elect -- if the evidence supports the argument, then it can be made if there is an aspect of knowing. And the other thing is sometimes you need a definition to contrast. It helps set out what --

MR. KELLY: Your Honor, with all due respect, I don't believe that's true for a greater crime.

THE COURT: Well, again, I would love to see a case. If you've got it -- I'm thinking in terms of reasonable doubt instruction. There was a time when -- it didn't have to do with intent. It had to do with different burdens of proof. It would help a jury frame that concept. I don't see the harm on it. I don't see the prejudice that would result. If I'm missing it, I'm not trying to. I'm trying to see.

MR. KELLY: Here's the potential harm, Judge: We have received through the indictment notice for the crime of manslaughter based on a reckless mental state. And now the government argues knowing in its closing.

We've not been provided the opportunity to contest or prepare a defense or cross-examine, all those constitutional rights, in preparing a defense. It would actually be the first time in my

54

career that a prosecutor stood up and said you know, this really isn't the lesser included crime of recklessly causing the death. He actually knowingly did it. Again, Judge, with all due respect, I would submit that would be an immediate mistrial.

THE COURT: I think the actual conceptual issue is this: What if the state overproves a case -- let's talk in general terms. What if a state overproves the case and the jury is confused? My goodness. She intentionally did this. And then what are we going to do? It doesn't say intentional. It just says reckless. And what does "intentional" mean? I think that's the overall -- that's the concept.

Do you see what I mean, Mr. Hughes?

MR. HUGHES: I do --

THE COURT: If the state does in fact --

Let's abstract it from this case, Mr. Kelly, and just think if the state overproves a case to where at the end of it, the state proves that she did this intentionally but all they charged was manslaughter or recklessness standard. Now -- you know -- you're saying that there is no way that that can be explained to the jury. You

55

can include -- well, they only showed recklessness. But it's included because the state proved this higher level, this higher standard. That's what I think this gets to, and that's the concept.

MR. KELLY: And my response is twofold, Judge. First of all, I believe that's highly improper because of notice and due-process considerations. And, secondly, and importantly in this case, in answering your question, I haven't heard any evidence that my client intentionally or knowingly caused the death of another person. So it would be highly improper from that standpoint. You have to have -- and Ms. Seifter filed a brief yesterday about what's permissible argument by the prosecutor, by the government, in its closing.

And I would submit that would be highly inappropriate, impermissible, to stand up and now argue that Mr. Ray knowingly caused the death of these three individuals. There is no factual basis for it.

THE COURT: I abstracted it. And I'm saying this is what -- again, look at the legal concept. But the other part of it is too an instruction has to be supported by the facts in the case, the evidence in the case. The facts are determined by

56

the jury but by evidence. And it has to be supported.

So obviously there is no interest in just building in error by -- in this fashion. But I do --

There is the argument, Mr. Hughes. What evidence is there of these higher mental states that would be -- I guess, first of all, it would have to be a matter of notice, due-process notice, and what has the evidence been and whether it has to be part of the notice requirement or not.

MR. HUGHES: The due-process notice is provided the defendant with notice of the charge he's been charged with, not the proof, the greater proof, that may prove mens rea.

In other words, I think the defense is taking the notice issue -- and I can't even frame a response -- it's such a twisted argument, Your Honor, to say that there is a due-process violation because the state overproves a charge. That's not what due process talks about.

Due process requires the state to have the evidence, the defense to have the evidence the state's going to use, which they have, and to know the charge that he's standing in jeopardy for,

which the defendant has known since the day of the indictment.

He's not being placed in jeopardy for second degree murder or first degree murder in this case. There is no due-process violation.

With respect to the evidence, for example, for knowing, the jury has heard a great deal of testimony, and some of it is conflicting, but a great deal of evidence about what was said inside that sweat lodge and what the defendant heard or should have heard inside the sweat lodge.

It's the state's position that there is sufficient evidence from -- that's been presented from within the sweat lodge and from what people heard outside the sweat lodge for the jury to determine that he did act knowingly.

And if he did act knowingly, it's appropriate to give the greater mental states with the necessary included instruction.

And then again, as the Court noted, there is an important aspect to being able to differentiate and draw distinctions between these very complex lawyerly worded terms of art, which are mental states -- recklessly, knowingly, intentionally, negligently -- and for a jury to

understand, for example, what "negligently" means or "recklessly" means. It helps to have something for them to draw a contrast to, such as this is how lawyers word the term "intentionally." This is how we word -- or term the word "recklessly" and "knowingly" and "negligently." It allows the jury to draw a distinction between them by seeing how the different terms are actually phrased.

THE COURT: Mr. Kelly, anything else?

MR. KELLY: Judge, I -- I'd rely on the bible case as to what permissible inferences may be drawn from the facts. There is simply no permissible inference for intentionally or knowingly. Providing these two definitions potentially confuses the jury, potentially causes prejudice to my client.

And I think due process as a twisted concept under the law is a right that my client enjoys. And for the first time now in this case apparently there is an allegation from the government that he acted with a knowing culpable mental state. It's the first we've heard of it.

Anyway, I believe the record is made. And we would object to paragraphs 8(E) and (F) on page 8 and ask that the words "intentionally" and

"knowingly" be stricken from paragraph D on page 7.

THE COURT: Once again, I don't have one iota of legal authority indicating these could be an issue. These are very, very common definitions. Between the states the definitions change obviously. But often they're quite similar because they could come from the code, the original penal code. So a lot of times there are similarities.

Mr. Kelly?

MR. KELLY: Judge, I apologize. There is one other thing Mr. Hughes brought up. I don't think that in any way the state or the defense would be precluded from talking about intentionally or knowingly in front of a jury, how that's a higher mental state contrasting manslaughter with first degree murder, if the state wants to do that.

But what's at issue is what the jury is going to be instructed on or how the jury is going to be instructed. To that we would object.

THE COURT: Okay. Again, I don't think it's a question of causing prejudice. Does it assist the jury? What I'm looking at now is whether the jury is assisted and there is no violation of constitutional rights. Of course, looking for that and it actually provides assistance in interpreting

the law correctly.

So I don't think there is a legal problem in giving that for the reasons stated. I'm inclined to do it. But, once again, I'll attempt to see if there has been anybody who has dealt with that. I've never had to deal with that a number of years now.

MR. KELLY: Judge, I'll tell you. I've never had to deal with the possibility of including "intentionally" or "knowingly" in a manslaughter case. Always those two words were stricken and only the definitions that apply were brought in.

I do have in regards to 8(G) a proposed correction. And I believe, Judge, it should read, and an unjustifiable risk that his conduct will result in death.

MR. HUGHES: I have no objection, Your Honor to that.

THE COURT: Okay.

So, Mr. Kelly, you're objecting to E and F?

MR. KELLY: And asking that you strike those two words from D on page 7.

THE COURT: What is that on seven?

MR. KELLY: It reads right now -- the state's

argument was that the only two places "intentionally" or "knowingly" appeared was in the definition of "included mental states, criminal negligence."

I would submit, Judge, that I'm pretty sure I'm consistent with case law that that would apply only if those other crimes were alleged in the indictment -- intentionally causing the death or knowingly causing the death. Since they're not, they should be stricken. And 7(D) would read, that requirement is satisfied if the state proves the defendant acted recklessly.

THE COURT: Right. Okay.

MR. HUGHES: Your Honor, on that note, the state had asked for included mental state for negligence, which is one -- standard 1.5, 6.03, and also included mental states for the reckless crime. The negligence was included in the proposed instructions. We would ask for the same reasons that the included mental state for recklessly, which is 1.05, 6.02, from the RAJI's also be given.

THE COURT: Okay. We'll take a little recess, then. Again, currently I'm inclined to do that, to give that instruction. But when we come back, we can look at the next two. And I know there is

going to be some debate on that.

Thank you.

(Recess.)

THE COURT: The record will show the presence of Mr. Ray and the attorneys. And one thing I want to bring up. I do know where the language came in in that instruction. I talked to Diane. And, in fact, that's a change I had suggested. It was in the defense's proposed instructions that added the conduct language. That's where it came from. And I just had forgotten that was the origin.

Again, I'm going to look at that. I don't think that changes the meaning at all. I just -- I'm going to strive to make it as clear as possible what I think what will make it most clear to the jury. That's everybody's goal, of course, in terms of getting the correct legal instructions.

With regard to -- as I've thought about the various states, Mr. Hughes, Mr. Kelly, my inclination is to go no higher than knowingly, not intentionally, but knowingly, and then have the other mental states. And that is based on the nature of the evidence and just -- I think it would be risking confusing going all the way to intentionally. But I think knowingly, there would

be logic to that.

MR. HUGHES: The state has no objection.

MR. KELLY: Judge, we do object. And we actually have someone looking for case law supporting our position. And if we find it, we'll provide it to the Court.

THE COURT: There is that one modification at this point. And that goes with any of these instructions. If anybody has some case law, I've invited that.

On page 8 the next two are requests by the defense, meaning of "substantial and unjustifiable risk."

Mr. Hughes.

MR. HUGHES: Your Honor, the state does object to paragraphs H and I on page 8. The language parts of it come from really almost what would be dicta in the in re William G., the Far West case. Both of the -- in re William G. case makes it clear that the substantial and unjustified gross deviation are to be given the common meanings because they're not defined by the legislature.

Some of the language that's cited here, for example, came from the in re William G. case, which used a dictionary as showing what some

examples of that word are. But they do not -- in re William G. does not adopt that dictionary term as the dispositive meaning. And the dictionary term would be the "flagrant" and "extreme" and "outrageous," "heinous" and "grievous."

The -- in short, the request for "substantial and unjustified" to be defined, particularly with this language that's used, is unsupported by those cases, as far as I know, never been used in any other criminal case involving homicide in the state of Arizona. There is certainly no published case where that was used as a jury instruction.

And the state would ask the jury be allowed to use the common meanings for those terms.

THE COURT: Let's take them individually, H and I. But your argument is applying to both H and I. But anything else with respect to H specifically, Mr. Hughes, at this point?

MR. HUGHES: Your Honor, the verbiage itself. Risk of death must be so high and the likelihood of death must be so great that the risk is substantial and justifiable. I don't know where that term came from. Again, it's taking concepts, I think twisting them a little bit and then putting them

down improperly.
THE COURT: Mr. Kelly, as to H?
MR. KELLY: Judge, first of all, I take issue as to whether or not there is a published case which instructed the jury with these definitions. We simply don't know that because most public cases do not include the jury instructions that were submitted to the jury. So we simply don't know.
In regards to the proposed or submitted H and I, Judge, it's -- those two proposed jury instructions were, in fact, drafted directly from Arizona case law.
THE COURT: It's Judge Sult's language in Williams; right?
MR. KELLY: Ms. Seifter has a better understanding of the specific case. But I believe so. Yes.
THE COURT: Well, I just looked at another dictionary definition of "gross deviation" or "gross" on the break. And it had to do with "flagrant" and other various terms you can use. But "flagrant" and "extreme" is in there.
I want to say this about the whole idea of the standards and what's required to prove the mental states and the nature of the risk that's

involved. It seems that Williams and maybe -- almost suggests that there is a probability aspect to it. And I think during arguments -- during the case here there has been a suggestion of probability. And, of course, probably the impaired driving type of cases is the most common type that brings up the mental states of criminal negligence and recklessness, I would think. I think probably more recorded decisions in that area for those. If not, that's certainly where there are a lot of them.
And it seems to me in talking about the nature of the risk, substantial and justifiable, to speak in terms of probability, I don't know that that's the case. I think of the statistics that show how often is there a drinking and driving incident before there is an accident with any injuries. I don't think probability captures the concept.
Again, somewhat similar to the Willits instruction and making the distinction between the two elements of something might be beneficial but then having to show prejudice, distinguishing between substantial and unjustifiable and then a gross deviation from the standard -- when Mr. Li

argued this, he made a very -- he made a distinction in that.
And I think it's pretty difficult from the cases to say exactly what the courts were getting at in talking about a gross deviation from the standard of conduct. Is that because it's just so likely to happen, which is really under substantial and justifiable? Or is it such a terrible result, as in Far West, that there is an element of that being a gross deviation because the potential harm is so high? There is almost a suggestion there.
Difficult concepts really to deal with and perhaps some that are just best left to juries.
But I asked for arguments specifically with regard to H and I but closely related. But is there anything else to say with regard to I?
Same kind of argument, Mr. Hughes? What's your argument with regard to I and gross deviation?
MR. HUGHES: Your Honor, again, I think that it would be a similar argument. Judge Sult addressed these issues in the in re William G. case and gave a dictionary definition that has that "flagrant" and "extreme," "outrageous," "heinous"

and "grievous" language. And then goes on after that to say well, this etymological reference is not clearly definitive. And that's the reference to this quoted language.
It does seize on the term "gross" with sufficient semantic flavor to cause us to conclude that the deviation from an acceptable behavior required for recklessness must be markedly greater than the mere inadvertence or heedlessness sufficient for civil negligence.
Again, Your Honor, this case talks about that these are undefined terms that should be given their ordinary meaning. And that's something that the jury is entitled to do. It's clear in the in re William G. case and then the Far West, that cites some of the language from in re William G., this is not the definitive definition. In fact, he says it's not clearly definitive.
They're trying to apply facts to law to determine if the outcome was appropriate. And so they're looking at other definitions to allow them to do that. But a jury should be allowed, as Judge Sult recognized, to apply ordinary or common meaning of the terms.
THE COURT: The court of appeals decided as a

69

matter of law that did not -- that the shopping cart keeper did not meet the standard of substantial and unjustifiable and gross deviation, decided the trier of fact, who was also a judge in the case, was just wrong as a matter of law.

But I would like to anticipate having the parties address this: If the state definition is given -- I mean straight -- straight out of the statute as to gross deviation, then the parties are just free to assist the jury in dictionary definitions?

MR. HUGHES: I think that's customarily what's done when there is a -- an undefined term and the parties have some difference of opinion as to what it means. The parties should be able to argue the ordinary meaning of what a term means. And that's in keeping with the long line of case law in Arizona on statutory construction and particularly statutory construction of undefined terms.

THE COURT: Mr. Kelly?

MR. KELLY: Judge, the -- as indicated in H, the important distinction here is providing an instruction, based on the law, to the jury to allow it to distinguish between civil and criminal liability.

70

And I point out that in G. Williams the Court concludes. In other words, there is no doubt about it. They're discussing this very issue. And to -- I would suggest that it invites error to simply allow attorneys to stand up and we could each use our own definition as to what "substantial and unjustified risk" or "gross deviation" is without providing guidance to the jury. We can end up with a wrongful conviction.

THE COURT: You're saying, for example, Mr. Hughes gets up there and says, well, it doesn't really mean flagrant and extreme. It means slightly different. And now you've argued a different legal standard that isn't supported by the law. Is that what you're saying should be avoided?

MR. KELLY: Absolutely. And then, finally, Judge, I would submit if it's not defined, we may find ourselves in this very position during deliberations when the jury asks what is the definition of these terms? What are the definitions of these terms?

And now -- and, again, I keep harping on due-process violation. But when you talk about, as you've termed it, a unique criminal prosecution, it

71

constantly raises that issue of due process. And I would submit that we're entitled to receive instruction from the Court as to what these terms mean so that they can be argued and connected to the facts that would present it during the jury trial itself in helping the jury reach a verdict.

So I would find it somewhat dangerous if we were just left to argue our own meanings in these two terms. And, again, both H and I were based on the case law. And I think they're pretty well drafted, apparently try to distinguish these important legal concepts.

THE COURT: I think it was Judge Sult who had the case where the jury got the dictionary a number of years ago to try to sort this type of thing out. It's the type of thing that -- not that this jury would not follow the admonition but --

Really, Mr. Hughes, you don't see a danger in just turning this over and then both sides kind of arguing whatever the terms are? And I say, no. Wait a minute. You need to go back and decide what you think the common meaning of the term is.

That is, Mr. Kelly, of course, what it says, if there is no legal definition given.

72

And these are not new charges here -- you know -- this is not a new type of statute. Put it that way. The statute's been around in this form a long, long time. The courts don't usually instruct on these types of matters.

But I can see the problem, Mr. Hughes.

MR. HUGHES: In response, these terms have been around for a very long time. It would be appropriate if there was a jury question, to tell them you must give the ordinary, common meaning to that term as you understand it to be. And those questions do arise from time to time.

The problem with using, for example, the language that's in this case, which is from the Far West, that was originally used by Judge Sult in the in re William G., is the Judge, Judge Sult, makes it clear that that etymological reference is not clearly definitive and then goes on to later -- and these are referred to in the junctives (sic) that they all have to be together for a finding.

And paragraph 18 of Judge Sult's opinion, he indicates that it's an "or" finding even for those terms. There is no finding there was flagrant, extreme, outrageous, heinous, or grievous. And that's just using the terms there.

This -- again, this language, which is an attempt to give a partial meaning to a common term, is now being sought to be used as the conclusive meaning. And it's -- again, it's inappropriate when the legislature and the courts have made it clear that these words should be given their ordinary, common meaning.

And, Your Honor, I'm unaware of a case where -- although it sounds like it happened in Yavapai County where a jury was given a dictionary but --

THE COURT: They weren't given a dictionary. I think they decided on their own, if I recall from the decision, to go consult one. They were not given a dictionary.

MR. HUGHES: That should not -- either course should not happen.

THE COURT: That's my understanding of that. But this is the kind of thing. I think Mr. Kelly is correct. When you say, gross deviation, that's not very helpful.

But we've gone through a number of versions of RAJIs. And, again, just because there is not one there doesn't mean you don't do the correct thing. If the correct legal and

constitutional thing is give more elaborate instruction, that needs to be done.

I'm really concerned there is this kind of disagreement because I'd like to see a real effort to give the jury clear guidance. And to just say gross, and you're just saying you can argue whatever you think it might mean and Mr. Kelly can argue whatever he thinks it should mean, or Mr. Li or whoever does the argument, or Ms. Polk, when there is a legal decision out there that says I think these are really the words that capture the concept, that should be avoided and we should just leave it to the lawyers to argue?

MR. HUGHES: I'm not sure that's what Sult says. It doesn't say --

THE COURT: No. I'm not saying he says that at all. I'm saying what are you saying how he decided -- you know -- I've got to look at this and decide is this the kind of case which belongs in the criminal justice system. These terms like "gross deviation," and "substantial" and "justifiable." I got to look at what it means. And I get to gross deviation, and that doesn't say to me -- I have to look beyond that to see what it means.

So he looked at that to see if it actually gets to the level. And he goes, no. If that had gone to a jury and the jury had said well, we find that it did, then it would have been incorrect. So he felt the need to sort out the definition by looking at other meanings of the word.

MR. HUGHES: And I think that's appropriate for the -- for the trier of fact, which in this case Judge Sult was stepping into the shoes of the trier of fact based on the posture of the case to give a word it's ordinary meaning.

In this case Judge Sult took the position that there was not evidence. And the appellate court will do that from time to time.

But to use a set of definitions that even Judge Sult indicates are not definitive and then to misstate them as all of these have to be present, as opposed to even Judge Sult indicated in paragraph 18, which is that they're used in the disjunctive, is to misstate both the holding of Sult and also the long line of authority in this state regarding undefined terms.

There is always a risk that Your Honor or later the court of appeals will find that the

evidence does not support a charge for whatever reason. But that's a risk that occurs anytime you present a case to the jury. I agree that it happened in this case because of the difference of opinion apparently between Judge Sult and the trial judge as to what these terms mean and whether the young man's shopping cart conduct was mere civil negligence or whether it rose to the level of recklessness.

THE COURT: I think the law is as Mr. Hughes has stated. If it's a term that's not defined further in the statute, it's to be regarded as it's normally interpreted.

Mr. Kelly?

MR. KELLY: May I reply, Judge?

THE COURT: Yes.

MR. KELLY: I have the case in front of me in paragraph 8. And it says, it causes us to conclude the deviation from acceptable behavior required for recklessness must be markedly greater than that -- than the mere inadvertence or heedlessness sufficient for civil negligence. The deviation was not a flagrant, extreme, outrageous, heinous or grievous deviation from the standard. In short, the deviation was not gross.

And what's missing in this analysis is that unlike a term such as -- I can't think of an example right now. But unlike a term where there is not case law interpreting the legal meaning of the term, now we have a case on point that does define this term. And that's where paragraphs H and I are submitted to this court for consideration.

So we're not just in this vacuum where these terms have never been defined by an appellate court. We have a case on point. So how could we be wrong by instructing the jury according to an appellate court decision?

THE COURT: How could we be wrong -- how could I be wrong, Mr. Hughes, by instructing the jury in strict accordance with an appellate decision defining a term in the statute?

MR. HUGHES: Because this term is not defined by Judge Sult. Judge Sult gives a list of some of the definitions and then indicates that that list is not clearly definitive.

So what you would be doing, in contravention to a long line of case law that says jurors need to apply their ordinary, common understanding of the meaning of the word, you're

going to potentially tie the jurors' hands as to what that word means based on a noninclusive list of possible meanings for that word. And that list, which the Judge says is not inclusive, is going to -- by definition, if it's not inclusive, it is excluding some other relevant terms for that word.

And that is what is going to run afoul of the long line of cases that, again, say if it's undefined, the jurors use their common meaning.

THE COURT: So you think that would not be helpful for the jury at all or it would be improper?

MR. HUGHES: Your Honor, I think -- although it could be helpful in the sense that jurors would like instruction, the instruction would be incorrect and contravention of the law. Because it would not be a conclusive list of what the possible meanings are for that term.

THE COURT: What if it were left open, these and other terms that the jury believes to be the common meaning? What if it were left like that?

MR. HUGHES: I think if it was left like that, that would certainly correct or alleviate many of the concerns that the state would have. If it was made clear this is a nondefinitive list of possible

meanings and that they're stated in the disjunctive, the state would not have an opposition to that.

THE COURT: Mr. Kelly?

MR. KELLY: Judge, that suggestion is closer than just not having a definition. I think we'd have to see the exact language. But that seems like at least we're on the right path.

THE COURT: Then if it's put in the disjunctive, I'll check with the case. I'm going to put an instruction in in the disjunctive and also suggest that they're not -- it has to be phrased that they can apply other appropriate, common meanings if there are any. I think Judge Sult was pretty inclusive in his effort there.

Okay. Again, if there is some specific law on that. That takes care of gross deviation.

Back on H. I --

MR. KELLY: Your Honor, if I may. In terms of direction for the Court, the second paragraph under gross deviation is a California suggested jury instruction. So there is -- my understanding is there is some precedent for that suggested instruction.

THE COURT: The second paragraph under R on 8 and 9?

MR. KELLY: Yes, sir.

THE COURT: I wasn't even looking at that. I was looking at more the language. And I guess the thing that's going on here is the distinction between the nature of the case -- there is just not a body of case law that has developed in this area.

So to try to get this clear, we're talking about I.

Mr. Hughes, what about the second paragraph?

MR. HUGHES: Your Honor, the second paragraph seeks impermissibly to add additional elements to the offense. The second paragraph is cited in the defendant's request to jury instructions. They don't cite a California case. They cite the Far West and in re William G., neither of which support that paragraph.

California -- I don't know if California has the same constitutional provisions as Arizona, specifically the Article 6, Section 27, regarding charging the juries or commenting thereon. But it appears to me that not only does that second paragraph add to the elements of Arizona statute,

it appears to be a comment on the evidence, including the misadventure and mistaken judgment. It's wholly unsupported.

Again, we're dealing with an area of Arizona law which has not changed very much when it regards to mental states and homicides. And it's unsupported by Arizona case law. It adds elements that should not be added, and it appears to conflict with the Constitution, Article 6, Section 27.

MR. KELLY: Judge, in paragraph H, and I apologize for going backwards, I'd ask you when you're reviewing in re William G. to look at paragraph 13. That's almost word for word out of that case. There is also a State v. Jansen case that's cited.

Only conduct which created this high degree of risk would support the inference the juvenile was aware that he was creating such a risk. That was incorporated into this proposal.

Again, Judge, I think the real issue is how to properly instruct the jury to make sure that if there is a guilty verdict, that it was not based on an erroneous assumption that somehow a civil standard for negligence was sufficient. And that's

all we're attempting to do.

THE COURT: There have been multiple cases instructed, I would think, on the RAJI that have not had an issue with that.

MR. KELLY: And yet, Judge, you have emphasized that this case is unique in that regard in terms of its factual background supporting this purported crime of either manslaughter or negligent homicide.

And so our biggest concern is that a jury, since these are unique facts, will not clearly understand the culpable mental states, the definition of these terms that are routinely applied in a manslaughter case, such as the reckless discharge of a weapon, or, as you point out, driving while impaired.

MR. HUGHES: And those concerns are addressed by the instructions that we're providing that primarily come from the RAJI for manslaughter and negligent homicide. They both include the much higher requirements for mens rea than you would have in a civil negligence case.

THE COURT: Okay. I think I'll have an instruction. I have the arguments. Thank you.

On 9, presumption of free will, I

attempted to find any instruction that's similar to that in other cases. I couldn't find any. There are some that have to do with certain kind of assault cases that talk about that, whether there is coercion.

But, Mr. Hughes, your position on J?

MR. HUGHES: Your Honor, the state opposes it. It is unsupported by the law. Certainly in the Tison opinion that's cited by the defense in support of the instruction, the court of appeals on a completely unrelated issue determined that it's presumed that everybody possesses a free will. And that's something the defense can argue.

This particular comment is a comment on the evidence. It's directly in opposition to the Constitution, Article 6, Section 27. That's a defense theory of the case that there is free will involved by participants and whether or not that was a superseding, intervening cause of the death. And it's just an improper instruction. In California I think they would call this a "pinpoint instruction."

THE COURT: Mr. Kelly?

MR. KELLY: Judge, of course, the reason the request is made is after listening to Ms. Polk's

opening argument that somehow these individuals, their free will was overcome by the words of my client. And we do believe it's a correct statement of the law that the law presumes that these people have free will. And that if, in fact, they did, then the government's argument that somehow his words overcame that free will would simply be incorrect. That's why it was requested, Judge.

THE COURT: I think it's a matter of argument. I'm not inclined to give that. Okay.

You know, I want to return to H and I, the difficulty, and point out that you look at the -- for example, the Brown case and using reinstatement for duty. Courts go beyond the standard instructions and try to instruct on the law. And the Brown case, that trial judge believed he needed to get into the reinstatement and give people some guidance and did. And if it's necessary to get into an appellate decision to give people, the jury, guidance in "substantial" and "justifiable" and "gross deviation" in this particular case, then it's appropriate to do so. I just want to make that general comment.

Okay. Causation. That's an instruction I worked on. And I did -- I took the defendant's

suggestion for an outline anyway. I did not incorporate all the language. I didn't use things like "alleged" each time. But there really are three things. You get into proximate cause. If you don't put it in an outline form like that, then there's this proximate cause thing that just comes along that's not part of a whole definition.

So it seemed to make sense to me to do it in that fashion. So I tried to do it and encompass all the law that would go into that causation question with the superseding, intervening event.

Mr. Hughes?

MR. HUGHES: Your Honor, the state made its record last week regarding the language that we had requested to be added in. I don't have anything to add to that --

THE COURT: Mr. Hughes, let me get that language out, though. You can make the record on that. I've got all the briefing here.

But point to your specific language.

MR. HUGHES: Your Honor, it would be on page 3 of our June 10, 2011, state's requested final jury instructions. And it's also on page 4. But it would be the italicized language, which was language that was added to the statutory criminal,

2.03. I know we discussed that at great length last week.

It is the state's belief that the italicized language on page 3 should be added in this particular case. It comes, essentially, from another RAJI. But it deals with the causation issue. Excuse me. It comes from a statute, the same statute, but different subsection, 13-203.

And we believed it should be incorporated into one unified causation instruction.

THE COURT: Yes. I've considered that argument. And -- I just don't think it's applicable.

Mr. Kelly?

MR. KELLY: Judge, I would incorporate all of Mr. Li's arguments last Friday. Running short on time. Page 4 italicized language proposed by the state, Judge, I would simply state as is not proper. I believe, as Mr. Li said, essentially, have no defense at that point in time. Intervening force is not a superseding cause if the defendant's negligence creates the very risk of harm that causes the injury.

Off the top of my head, I can think of a very simple example. If I leave a loaded firearm

in my closet and then my neighbor, unbeknownst to me, comes and picks up the firearm and shoots my other neighbor, according to that, my negligence would result in my responsibility for first or second degree murder. And that's simply not the law.

Again, I know we're short on time, Judge, So I would simply incorporate all the arguments by Mr. Li, and I don't think it's proper.

THE COURT: If either side or any of the attorneys are is saying short on time, as I indicated last week, we've had a trial that's gone on months and months. And the jury instructions are extremely important. And I'm not going to rush through at this stage. So both sides need to make the argument, try to make the decisions.

MR. KELLY: Judge, I would simply incorporate Luis's argument that was extensively discussed last Friday. We agree with the proposed language in the document we've been provided today. And we have one correction.

THE COURT: Okay.

MR. KELLY: But if you need to hear further argument, we're prepared.

THE COURT: This is what I intend. I think

Mr. Hughes made the record he wanted to make.

MR. HUGHES: I did, Your Honor. And only to respond to Mr. Kelly's proposed fact scenario, I think that situation and generally a case like our case here is precisely the sort of situation that State versus Slover was talking about when it tried to explain when an intervening force is not a superseding act. That was an argument made by the defense in the Slover case -- which is the person who wound up drowning after the vehicle rolled. And I think Slover is directly applicable. And the language which comes from Slover and is quoted on page 4 is very important language that should be given and should be given in a fact scenario such as Mr. Kelly's fact scenario.

THE COURT: Slover, of course, came up in a different procedural posture. The defendant wanted a superseding, intervening instruction. And the Court said no. And then the appellate decision said he wasn't entitled to one because it was foreseeable.

Implicit there is that the foreseeability argument -- and the law was set out either side could argue. There it was to -- you know -- to argue causation. I don't know if he gave a

specific causation instruction in that, but what happened was --

And isn't that correct? The defense did not get the instruction that the defense wanted?

MR. HUGHES: It is, Your Honor. In justifying that decision, the Court explained or created law in Arizona that an intervening force is not a superseding cause if the defendant's negligence created the very risk of harm that caused the injury.

That's why it's an important instruction to go be given. The law didn't exist necessarily before Slover. But we now have it as a correct statement of the law. It's the state's opinion it should be given in this case.

THE COURT: It all goes to foreseeability. And I went back and I looked at the Gibson case that talks about how foreseeability is a jury question. Questions of duty are for the Court. We're going to get into that in a moment.

And foreseeability is in the instruction here, and both sides can argue that point. It's not -- neither side is going to be restricted by the lack of instruction.

So anyway, I'm going to give that

causation instruction. But Mr. Kelly indicated there was a typo or something.

MR. KELLY: Judge, we would suggest that under 2(B), the second line of that paragraph would read, Ray must have engaged in the causal conduct versus just conduct. And the reason is the consistency with paragraph 8.

THE COURT: Mr. Hughes, any record on that?

MR. HUGHES: Your Honor, I think it would -- I find that confusing just as it's being read. I think it might confuse the jury. As it's written, it's a clear and concise statement. It's not in the RAJI, but it's, essentially, something that was proposed by the defense. The state would have no opposition to as it's written.

I do think adding causal conduct then -- which is also used in subparagraph A -- I think that it just makes it a little more confusing for the jury. The jury is already being given the element of what the conduct has to be. And now are they going to be looking for a definition of "causal conduct" as opposed to ordinary conduct?

THE COURT: Okay. I'll just read this over, and at this point, whatever it seems clearest to me. It starts right out, No. 1, but for the

conduct the result in question would not have occurred. So it's pretty clear you're talking about the causal conduct. It does seem to possibly interject a term of art.

So anyway, I note your preference for that language, Mr. Kelly.

MR. KELLY: Judge, we just leave that to your discretion.

THE COURT: Okay. I don't think it's necessary to have that extra adjective.

Page 10, preexisting physical conditions.

MR. KELLY: Judge, we had a question as to whether that is an appropriate instruction given the evidence in this case. And I'm making that assumption. The assumption is that Mr. Shore had an enlarged heart. That's the only preexisting physical condition I can recall hearing evidence of in terms of the three victims.

THE COURT: The testimony that two of the decedents had cardiovascular disease, one in a more advanced stage than the other apparently. Dr. Lyon testified -- I'm just going from recollection. Dr. Mosley. I'm sorry. It was Dr. Mosley that testified regarding that factor.

MR. KELLY: Judge, what I would state for the

record is that any preexisting physical condition was not established to a degree of medical certainty through the testimony of the doctors. In fact, I believe Dr. Lyon said that he could not provide an opinion as to whether there is a causal connection with death.

Secondly, that it would not be appropriate, then, to draw a conclusion as a layperson as to causation as to this preexisting physical condition.

THE COURT: Mr. Hughes, what is the authority for that?

MR. HUGHES: Your Honor, the causation instruction for preexisting conditions is supported by State versus Decello, D-e-c-e-l-l-o. It's 111 Ariz. 46. And it's a supreme court case from 1974.

The law in Arizona is you take your victims as you find them. And that's what this instruction states. There has been testimony both from the medical examiner and also in the evidence in the form of the autopsy reports that show that two of the victims -- Ms. Neuman and Mr. Shore -- suffered from partially obstructed coronary muscle. And that is one of the -- I believe Mr. Shore's case. That was listed as one of the contributing

93

factors for his death.

The law in Arizona as stated in the Decello case has been the law for 37 years now that you take your victims as you find them. But supported instruction should be given in this case.

THE COURT: Correct statement of the law I've understood for a long time.

MR. KELLY: Judge, clearly you take your victims as you find them. There is no doubt about that. The issue here is whether or not there is a preexisting condition that is a contributing factor to death. That's the issue.

In all candor with the Court, I don't recall whether Mr. Hughes indicated, I believe, an autopsy report indicating that. If that's the case, it's clearly proper to instruct. I was just remembering that -- the testimony.

THE COURT: Well, Dr. Paul talked about it too. But I -- saying one of the medical examiners actually talked about that being a factor.

MR. HUGHES: I believe Dr. Lyon talked about that pertaining to Mr. Shore. I think it was noted in Dr. Lyon's autopsy report, Mr. Shore and the condition that Ms. Neuman suffered from was noted in Dr. Mosley's report. There is evidence that the

94

jury has heard there are these preexisting medical conditions.

THE COURT: I'm inclined to give that.

Mr. Kelly.

MR. KELLY: I just want to say for the record, if it's simply noted in the report, that's not the determining factor as to whether the instruction should be given. As an example, if there is laceration on the left arm noted during the autopsy, that was not a contributing factor in regards to the cause of death.

So there has to be that connection as well. And I recall Dr. Lyon's testimony quite differently, that he could not connect up the heart condition with the cause of death.

So, again, Judge, we'll leave it to your discretion. I thought I heard Mr. Hughes state more clearly a moment ago that the heart condition was a contributing factor and that was stated in the autopsy report. That's different than merely being referenced. And the exhibit speaks for itself. So --

THE COURT: Okay. Because there has been evidence and testimony about that, a juror might be confused about it. And this is a correct statement

95

of the law. I'm going to include this. I'm inclined to do that.

Multiple actors, No. 9. And I did change the -- this is, basically, the RAJI. But used word like "prime," which I know that's how it's being characterized from one point of view. But, again, this is a case where with concepts of criminal negligence being involved and recklessness. So that's, essentially, the RAJI. I did change the language slightly. I know the defense had its own suggestion.

MR. KELLY: Judge, I guess the question I would have from the state or of the state is what the inference is. Who is the other actor?

THE COURT: Okay. Then, Mr. Kelly, actually you should go first on this because this was proposed by the state. What's your objection?

MR. KELLY: And that's my question. There has to be an inference or reasonable basis to make the request. That was our only question as to why this was somehow now going to be a part of this case.

MR. HUGHES: Your Honor, I think, first of all, the state has no objection to the verbiage as proposed on paragraph 9, page 10. The jury has heard evidence that other people were involved in

96

constructing the sweat lodge, that Mr. Mercer was involved in helping to heat the rocks, that a fellow named Rotillo was involved in heating the rocks.

Those are factors that may or may not implicate those persons. I find it hard to believe the jury would find the other people responsible. But to the extent that a jury could find that based on the testimony of the Hamiltons' involvement, the Mercers' involvement, Rotillo's involvement, this is an appropriate instruction.

In other words, if one of them somehow were involved then -- or one of Mr. Ray's Dream Team members, for example, was involved in committing the crime, the state has alleged, of course, as an aggravating factor the presence or use of accomplices, his Dream Team members, for example.

It's an appropriate instruction. It's supported by the law in Arizona, including the State versus Cocio case, 147 Ariz. 277, supreme court case from 1985. It should be given in this particular case.

THE COURT: You've read paragraph 9, and that's acceptable to the state?

97

MR. HUGHES: I have, Your Honor. I don't -- perhaps Your Honor had -- maybe there has been a revision to the 2.03.03 that references the word "crime"?

THE COURT: Yes. There hasn't. I want you to look at your suggestion in the RAJI because I went through, and that's not the language. But the way it referenced "crime."

MR. HUGHES: I read your proposed language, and I think it accurately states the law. I have no objection to it.

THE COURT: Mr. Kelly, anything else?

MR. KELLY: Judge, no. Thank you. That was our question.

THE COURT: Nine is going to be included. Before we talk about closing instruction, this I found to be different, this is a new closing instruction that's in the supplement now to the RAJI.

But I want to talk about the substantive matters that the state has proposed with regard to duty and also the defense request for a antiduplicity instruction. Those are two major things that need to be discussed.

Ms. Seifter?

98

MS. SEIFTER: I believe both sides proposed RAJI 11, Your Honor, just for the record, which is on multiple acts. I think that's what you're referring to.

THE COURT: Then that's it. If both sides agree on that, then that will be.

MR. HUGHES: Your Honor, the state did request RAJI 11, and we do think it should be given in this case.

THE COURT: Okay. I just want to make sure I have the right form.

Do you know if that's been revised in the supplement?

MS. SEIFTER: Your Honor, our proposal did change the wording slightly. So we would ask our wording be considered whenever we go over this.

THE COURT: Okay. Let's look at that right now.

Do you have the actual RAJI language, Mr. Hughes?

MR. HUGHES: I do, Your Honor. I've checked the amendments, the supplements, that have come out in 2010. It has not been changed. The language in standard 11 is, the defendant is accused of having committed the crime of "blank" in count "blank."

99

The prosecution has introduced evidence for the purpose of showing that there is more than one act or omission upon which a conviction -- and then it says on count "blank" may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts or omissions. And those are in brackets.

However, in order to return a verdict of guilty to count "blank," all jurors must agree that he committed the same, and then in brackets, act or omission or acts or omissions. It is not necessary that the particular act or omission agreed upon be stated in your verdict.

Your Honor, the state believes that the RAJI is a correct statement of the law and would ask that the RAJI language as drafted be given.

THE COURT: Ms. Seifter, what do you believe is the weakness in the RAJI?

MS. SEIFTER: I believe the weakness, Your Honor, is the sentence that says, defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts or omissions.

We don't agree to that as a matter of

100

fact or law in this case. It might be true in other cases where there are explicitly -- for example, there were three different shots fired -- you know -- in a matter of hours. And everybody agrees that any one of the shots would constitute a crime.

But here, as you know, the defense's position is that many of the acts that have been alleged or suggested actually are not crimes.

And so the way that we rephrased it, we believe, emphasizes that -- both the correct burden of proof and omits an affirmative statement that definitively finding that any of these acts was committed would be a crime. I believe that's the only distinction that we attempted to draw between the RAJI.

THE COURT: Okay.

MS. SEIFTER: And, of course, Your Honor, we object to including omissions. But it seems like we're going to be dealing with that issue separately.

THE COURT: We are. I'm going to get a look at the RAJI language again. Fairly complex area. I'm going to -- I'd be inclined to go with the RAJI, but I'll compare the defense instruction and

again look for clarity and accuracy. There will be a No. 11 type instruction.

Okay. Then the other primary area I'm thinking about is the one concerning duty.

MR. HUGHES: Your Honor, the state had also asked for the flight or concealment.

THE COURT: We can deal with the flight or concealment. I'd like to hear your argument on that, Mr. Hughes.

MR. HUGHES: Your Honor, the flight or concealment -- it is of RAJI. It's supported by the law in Arizona. In this case there has been evidence of concealment. That evidence came in through the testimony of Sergeant Barbaro, who testified regarding his query of the defendant as to, first, who was running the event. And the defendant said he was. And then he asked, who was running the sweat lodge, and the defendant told Sergeant Barbaro that Ted Mercer -- Ted was running the sweat lodge.

That's evidence of concealment that the jury is entitled to consider. The instruction, in other words, is supported by the evidence in the case.

THE COURT: Mr. Kelly?

MR. KELLY: Judge, I take it from Mr. Hughes's comment that evidence of flight is not being proposed. We had this discussion several months ago.

THE COURT: Mr. Hughes, you're arguing this is a type of flight?

MR. HUGHES: It's a type of concealment, Your Honor. The instruction deals with flight or concealment. And it would be the -- up to the jury to determine if Mr. Ray was confused about that or if he was trying to conceal his role in the crime.

MR. KELLY: And my initial inquiry, Judge, was simply for simplification. Is the state agreeing that flight, evidence of flight, will not be instructed?

THE COURT: Mr. Kelly wanted a distinction between flight and concealment. I blurred them.

MR. HUGHES: As far as I know, there is no evidence of Mr. Ray's flight in this case. It's not the state's intention to argue that he fled.

However, again, I think the fact on the instruction which explains running away, hiding or concealing evidence, that helps to explain the concept behind the instruction, which is when a defendant is doing something to absolve himself of

detection, then that's something the jury can consider.

So I would ask that the RAJI as written be given because the other examples that it gives helps to explain that concept to the jury.

THE COURT: Mr. Kelly?

MR. KELLY: Obviously, Judge, we would object. Again, I believe we had this discussion at sidebar during a break.

THE COURT: We did with regard to flight.

MR. KELLY: But now I think they're requesting it.

THE COURT: But not, I don't think, focusing on concealment as a different category.

MR. KELLY: Judge, I can address that. And obviously this is not concealment as that term is defined under Arizona law, hiding evidence. It's a -- two people having a misunderstanding as to what was said during an investigation that was not tape-recorded.

And I believe it was Mr. Li who cross-examined Detective Barbaro and brought out that distinction between his supervisor, Lieutenant Parkinson, and his report where that statement was not included. In fact, it was

different.

So I don't believe that met any threshold requirement of proving that Mr. Ray was concealing evidence. It was a statement that apparently was misunderstood between a detective and his supervisor.

So I've tried cases with flight or concealment of evidence, and this seems like a real stretch, Judge. I don't -- my recollection of Mr. Li's cross-examination, and I believe -- I really don't remember whether it was Ms. Polk or Mr. Hughes who presented the testimony of Detective Barbaro.

But I believe I've correctly summarized it. It was one statement, who is running the event? Ted Mercer was Detective Barbaro's testimony. That's not concealing evidence. That could be a lot of things, including a misunderstanding as to what was said by my client. That's corroborated by Lieutenant Parkinson's report. And the detective was impeached in that regard.

So the question is is the jury instructed on concealment of evidence based on that? That's pretty skinny.

MR. HUGHES: Sergeant Barbaro testified that there were two conversations. He had one with the defendant, in which case -- at which time the defendant indicated that Ted was running the sweat lodge. There is a later discussion where Lieutenant -- where Sergeant Barbaro was present with Lieutenant Parkinson, and Sergeant Barbaro was asked about what was in Lieutenant Parkinson's report regarding that second conversation.

But the first conversation Sergeant Barbaro testified was just solely between Sergeant Barbaro and the defendant. It is in that conversation that the defendant told something that was not true to Sergeant Barbaro in an attempt to conceal his role in the event. That's something for the jury to be able to consider.

What Mr. Kelly is arguing, there was a misunderstanding, is certainly an explanation that the defense can argue to the jury. But it's appropriate to give this instruction for the jury to know that they are allowed to consider concealment under the circumstances.

MR. KELLY: Judge, I'm looking at the use note for the RAJI. And what they're talking about is whether there is sufficient evidence to

substantiate a defendant's consciousness of guilt. And that's simply not the case here.

THE COURT: Many cases involve or have evidence of statements by a defendant where it's arguably an evasive statement. I'm just saying speaking in general or one that's not correct. And I don't think that concealment normally is tied in to that kind of evidence.

But, Mr. Hughes, again, I'd be interested. Do you have case law where concealment would be -- that really connotes to me a physical kind of act as opposed to a verbal, as flight obviously too. Do you have something that indicates verbally --

MR. HUGHES: I don't think there is any case law that distinguishes. Again, conduct can include his statement. It's not broken down to a physical conduct as opposed to a verbal statement. If he is concealing his role in the sweat lodge, that is concealing evidence in the case.

It would be analogous to a case where the police roll up on the scene of a drunk driver who struck somebody on the road, and the driver points to somebody else and says, Ted was driving. I wasn't driving. That, again, would be concealing

evidence, concealing his involvement in the case.

I think the reasonable inference from that is the only reason the driver is going to say Ted was doing it, or, in this case, defendant saying Ted was running the sweat lodge, is there is consciousness of guilt.

THE COURT: I have dealt with the flight aspect of this, and I've looked at the cases. And it's a pretty high standard. It is held to be prejudicial when you let in -- give a flight instruction and you don't have a strong basis for it.

And I would think it would apply to concealment, but I haven't dealt with the concealment aspect of it.

Mr. Kelly, does anybody have a case for me?

MR. KELLY: Judge, just looking at the use note again, here's an example. You're absolutely right. They're discussing flight and the relationship between concealment and flight. And there is a case where the absence of a defendant at the time set for trial after being released on bond was insufficient to support an inference of the element of concealment or attempted concealment,

which is essential to warrant the giving of a flight instruction.

So there is a situation where the conduct is apparently he was notified to be at trial. He wasn't. And that was insufficient. There is -- they talk about a two-part case. Excuse me. A two-part test. And as you've correctly recollected, the giving of an instruction unless both those prongs aren't met could be prejudicial error.

So I think that's a misuse of the standard RAJI 9, flight or concealment. It's talking about consciousness of guilt. And what we have is one statement which is disputed as to its authenticity or correctness, I suppose.

MR. HUGHES: Your Honor, the comment in the note that Mr. Kelly cited, where he left off, it went on pertaining to the defendant who doesn't show up for trial. Mr. Kelly left off with, which is essential to warrant the giving of a flight instruction. Where it goes on, it says, unless the flight or attempted flight is open, as upon immediate pursuit.

And then there is a case earlier on that explains that flight needs to be in response to

immediate pursuit.

It is correct it would be error to give it if it wasn't supported. The comment goes on to say -- or prior to that says, the absence of any evidence supporting the findings of flight or concealment would mean that the giving of an instruction would be prejudicial error.

In this case there is not an absence of any evidence. There is direct testimony from Sergeant Barbaro that a concealment occurred.

THE COURT: And the direct -- the statement you're suggesting again?

MR. HUGHES: Is when Sergeant Barbaro asked the defendant who was running the sweat lodge ceremony, and the defendant said, Ted was or Ted Mercer was. That's an act of concealment.

Your Honor, Ms. Polk advises that her recollection is he said -- Barbaro asked, who was running the sweat lodge, rather than the sweat lodge ceremony, and the defendant responded, Ted was.

THE COURT: Who was running the sweat lodge, as opposed to sweat lodge ceremony. Goodness. I don't decide issues of fact. I suppose that kind of issue would be for the jury. But I just -- I've

never seen this come up and be advanced as a concealment argument.

I just haven't, Mr. Hughes. That's why I'm reticent. I'm not going to decide the factual issue that that could be misleading or something. That's for the jury to decide. But I don't think it fits the concealment. Again, I'm going to have to try to look this evening to see if that's the case. Right now I don't think it fits.

Mr. Kelly?

MR. KELLY: Judge, we still have the duty issue, which is extensive. And perhaps an easier issue to deal with is we've also suggested that an instruction regarding the First Amendment be applied.

THE COURT: Yes. We can take that up. We have to get to the duty instruction proposed as well.

MR. KELLY: And that was filed on June 10, 2011, to the suggested language. Again, Judge, we've heard a lot of testimony in this case that I would submit attempts to hold my client responsible for manslaughter based on his speech. And we've heard a lot of testimony in this case regarding the content of his speech that may be considered

improper by some. I'm not sure. I don't know the beliefs of the 15 jurors.

But this particular suggested jury instruction emphasizes that a decision as it relates to manslaughter cannot be based on the content of his speech or ideas.

If you think back during the last four months, it's everything from the Samurai Game to the Vision Quest to Holotropic breathing to presweat lodge ceremony presentation. A lot of speech.

And given that, we believe that this jury should be instructed that they are to disregard his speech in making any determination as to whether or not beyond a reasonable doubt the elements for the crime of manslaughter or negligent homicide have been established by the state.

THE COURT: Normally I would ask Mr. Hughes to go first.

MR. KELLY: I'm sorry, Judge.

THE COURT: Mr. Hughes?

MR. HUGHES: The problem with this argument is that it ignores the long body of case law, including the United States Supreme Court case law, such as Wisconsin versus Mitchell case, which

indicates that the First Amendment does not prohibit the evidentiary use of speech when you're proving motive or intent or in some cases when you have an element of the crime.

A defendant cannot use speech -- the First Amendment to carve out speech and say you can't consider speech, the defendant's speech, in determining whether or not the defendant committed a crime.

If you did that, every bank robbery case where the defendant says give me the money or else, the defendant would stand up and say First Amendment. You can't hold that against my client.

That's not what the First Amendment seeks to protect. This proposed instruction takes one concept of the First Amendment and seeks to apply it on the other concept, which is that you can use speech for the evidentiary purposes of proving motive or intent or in some case elements of a crime, such as, again, a robber saying give me the money or else.

Your Honor, the Wisconsin versus Mitchell case was cited in the state's response to the Rule 20 motion. The brief cited 508 U.S. 476, from 1993. And it goes on to say evidence of a

defendant's previous declaration or statement is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability and the like.

And then both cite a number of other cases in that same section of the response to the Rule 20 motion, which make it clear that a defendant can have his speech considered by a jury in determining whether he has committed a crime or not.

THE COURT: Mr. Kelly, you started. Anything else?

MR. KELLY: Judge, if I understand the state's argument, that they can use my client's speech to establish motive. And we objected to the motive instruction because we don't see how that quite fits in.

And I believe the explanation was that his motive was to put them in an altered state. Well, we're not objecting to his speech in that regard. We're objecting to the speech as it relates to those other types of philosophical or spiritual beliefs that JRI or other participants of Mr. Ray may have held and the potential prejudice.

The second is to prove intent. Intent is

not an element of this crime. And the third was an element of a crime. And then we're right back to square one. How could Mr. Ray's speech in identifying a role in a game as an angel of death relate to an element of the crime? Or how could his speech relating to Vision Quest relate to an element of the crime?

That's the problem is that we have pushed up against the boundaries of freedom of speech throughout the entire course of this trial. We've objected. Sometimes those objections were sustained in response to the state's question. And there has been a whole body of evidence presented as it relates to my client's ideas. And we believe that this jury instruction is warranted.

THE COURT: This jury instruction, I think, will confuse the jurors a great deal. I rule that the speech -- a lot of the speech would be arguably relevant.

Mr. Kelly, you're saying you acknowledge that to some degree. But what about these other things that might have been said? That was one of the concerns I had with the issue of just having the search warrant return and whatever was seized put there in front of jury without a tie to actual

elements and factual issues in the case.

But content of the speech. The jurors would not know what to do with that. They might assume that well, can we not use anything? It's just an extremely complex issue, and more than one with -- there is an instruction that the jurors can't decide the case based on passion and emotion and those things.

That's what covers that. I mean, they're not supposed to -- if there is something there that offends them, it's a religious idea or something that they're offended by, they can't consider that. But the instruction in this form would be really confusing because they can arguably consider speech if they choose to do that -- certain kinds of speech, and discussed in terms of towards -- you know -- misrepresentations or even criminal offenses that involve misrepresentations and background to what is arguably a misrepresentation. There is a lot of speech that can be part of a prosecution.

So I understand the overall problem. This instruction does not address it. I think that the instruction regarding considering improper aspects, emotion, being prejudiced -- that does

address it somewhat. But I'm not going to give this instruction.

MR. KELLY: Judge, I guess understanding the Court's explanation, then if we struck the words "content of his speech," and if it would read, you may not convict Mr. Ray because of his ideas. You must not be influenced by, prejudiced or biased against Mr. Ray because of his ideas.

Again, the crime here is recklessness, the culpable mental state. So to the extent that Mr. Ray believes that Holotropic breathing is somehow a good thing to do as an idea has no relevance to the culpable mental state.

But I would submit, given the amount of time and the volume of testimony in this regard, that the jury should be instructed that they cannot be influenced by that type of evidence in reaching a decision regarding manslaughter.

MR. HUGHES: I think precisely the opposite is going to happen. If you give this instruction and say you may not convict Mr. Ray because of his ideas, the entire defense is going to be his idea was to put these people in an altered mental state, maybe not to kill them, but to put them in an altered mental state, the jury will assume we

cannot convict him because that was his idea, to put them -- his intent.

That instruction would blur the line between intent, mens rea, and idea to the point where the jurors could not convict Mr. Ray of anything. And it would impermissibly, again, extend the First Amendment into areas where this Wisconsin versus Mitchell case and the other cases cited and the response clearly say a defendant's speech is not protected.

MR. KELLY: Your Honor, I just have to say for the record because we've been arguing this for months, then what was the relevance of all that testimony that we sat and weathered through?

THE COURT: I'm not going to give this instruction. I've noted the concern about if there have been aspects of speech related to religious ideas, philosophies, that would somehow be misused; and there can be additional emphasis on not being prejudiced and not basing a decision on an improper subject like that. Then that's something I would consider. But I'm not going to give this instruction.

The other instruction in that pleading, Mr. Hughes, vicarious liability. The defense has

proposed that instruction.

MR. KELLY: Your Honor, we would reserve that request depending on -- we object to the duty instruction. And depending on the outcome, that instruction may or may not be necessary.

THE COURT: Let's talk about duty. Let me just get right to the point here. One type of instruction, one possible basis for finding a duty, Mr. Hughes, that you suggest comes out of restatement 322.

I'm going to give you my initial thoughts in this, and maybe it will focus the argument a bit. And that has to do with the creation of peril argument. And I note that Comment C indicates, where the original conduct is tortious, the duty stated in this section frequently is unnecessary to the existence of liability for further harm, pure tort and civil concepts. But that's what we're dealing with to some extent here.

I've already indicated that I found there is a duty, and there is no need to get to a secondary level of duty. So I'm not inclined at all to give the creation of peril instruction. It's not necessary, and Comment C explains why.

MR. HUGHES: Your Honor, I think Maldonado,

though, recognizes -- which discusses the comments, recognizes that they are two distinct duties. One is not -- the creation of peril is not a further violation, although it can be in some cases of the original duty. But it is a separate and distinct legal duty that a defendant is under.

THE COURT: The duty stated in this section frequently is unnecessary to the existence of liability for the further harm since the connection between the original wrongdoing and the further harm is usually such as to make the actor's conduct in law the cause of such harm.

So it says right there if there is an initial duty, there is no need to go on and elaborate and add another aspect to this case where the defense is talking about a different kind of cause altogether.

And that's -- Mr. Hughes, I want you to make a full record, because I do find there is a duty. There is. And once that's found, there can be all the arguments about foreseeability. And as we'll get to -- I'm going to hear argument by both sides about omissions and all of those things.

MR. HUGHES: Your Honor, the Brown case, I think, in its instruction, the Court would recall,

set forth a number of duties that the defendant owed the elderly person that was in her home. And then it said something along the lines if you find the defendant has breached the duty.

In this particular case there are several duties, and we've cited a number of them in our requested jury instructions. It's appropriate to instruct the jury on each of the duties because the jury may, for example, find that we haven't proven that there was a violation of the first duty but that there was of the second duty. The jury can accept or reject any of the evidence. So it's appropriate to instruct them on all of the legal duties that the defendant had.

And Maldonado made it very, very clear that the liability that's created under the creation of peril is a distinct and separate duty. That restatement 322 is a distinct and separate duty from the duty that arises by causing the original harm.

And I think that is the distinction to the extent that the comment to the restatement indicates that it's a similar duty or the same duty in many cases. Maldonado expresses the opinion of the court of appeals in Arizona that it is a

distinct, separate duty that exists.

THE COURT: Mr. Hughes, this area was argued quite a bit last week. And Mr. Li pointed this out. Through the entire case you have argued that this is not a case at all about omission. It's about positive conduct all the way through.

And then when the Rule 20 motion was filed a short time ago, now there is this. For the first time there is this assertion of an omission type of duty when you have indicated before that that's not what the case was about at all.

Is there no due-process element to this.

MR. HUGHES: Your Honor, I think the dispositive case on that is the case that I cited on that issue during the argument on the Rule 20. I believe -- I don't have it in front of me. I believe it was the Peazy case cited in the defendant's footnote to their Rule 20 motion.

And that case involved the person who was -- shot and killed a hunter. And the defense was given full disclosure in the case. At or around the time of trial, first raised the fact that the state had failed to set forth the statutes that had been violated that caused the underlying crime that the defendant was being charged with.

The court of appeals -- maybe it was the supreme court -- in that Peazy case had the opinion that there was no due-process violation because the defense had received full disclosure up to that point; and, therefore, the state's failure to provide the defense with the statutes that it alleged the defendant had violated -- the hunting without a license -- I think it was hunting outside of season, hunting from a road. They listed three or four of them that were the basis of the liability, that there was no due-process violation because the state had provided the disclosure that it had provided that provided the defense with notice of the facts that it would be using to support the case and because the indictment itself set forth what the charge was, who the victim was, and that sort of thing.

This is precisely the situation that we have here. An indictment sets forth the charges of manslaughter, sets forth the victims and the dates of violation, and it sets forth the primary statutes, the manslaughter statutes. It does not set forth the case law or the statutes dealing with duty but the -- which is the underlying basis that would support finding of liability for breach. To

me it is an absolutely analogous situation.

THE COURT: I want to find your form of the instruction.

MR. HUGHES: Your Honor, the state did file an amended instruction on duty on June 13.

THE COURT: I've got both of those.

And your instruction reads, the one filed yesterday, that the victim was helpless in a situation of peril as a result of the defendant's action or as a result of defendant's use of an instrumentality under control of the defendant. The defendant has a duty to render reasonable aid and assistance to the victim.

The actual restatement 322 says, if the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and endanger further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

So there is a major difference in the restatement making sure that the knowledge aspect is covered, but it's not even mentioned in your instruction.

MR. HUGHES: Your Honor, the language that the

state cited in the instruction is supported by the Maldonado opinion, which refers to specific language from an opinion called "Tubbs," which is also a -- I believe we cited Tubbs, Tubbs versus Argus.

Your Honor, that language is specifically from the Tubbs opinion as set forth and adopted in the Maldonado case. We believe it correctly sets forth the holding of Maldonado as far as the duty.

THE COURT: Well, it's clear from the Brown case and from -- the Brown case especially referred to the restatement. Far West Water and Sewer used other sources to provide the jury essential information about duty.

But, Mr. Kelly, this was addressed fairly extensively last week. But the state's the one requesting this instruction out of Maldonado.

MR. KELLY: Judge, I would simply incorporate our previous arguments in this regard. The state -- clearly it would be improper, a violation of due process. I'm looking at 13-101. It would be a violation of the public policy of the State of Arizona.

13-101 requires that the state -- to give fair warning of the nature of the conduct

proscribed, to define the act or omission accompanying mental state which constitute each offense and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth. It's set right in statute. Of course, it's an outgrowth of the Constitution.

If the State of Arizona doesn't know what the duty is until after the close of its evidence and after reading our motion for a Rule 20, then clearly we did not have notice, and clearly 13-101 and more importantly Constitutional protections have been violated.

So we object to the risk of peril duty, Judge. We're anxious to hear your view about it -- we have yet to see the language.

THE COURT: I've already stated it on the record.

MR. KELLY: Okay. And then if I may address that, Judge?

THE COURT: Well, I want to cover this issue because I can see some factual application.

But this instruction that you have proposed, Mr. Hughes, it does not at all address scienter. It would be improper. That instruction is absolutely faulty.

As an appellate proposition saying okay, this is the law, without actually incorporating the language that's required, it could not be given in this form. It could not. Also Comment C. I wasn't clear, Mr. Hughes, how you indicated how Comment C says, you know, if there is already a duty, this isn't really necessary. If there is already can be fault based on the duty that's found, this isn't really necessary.

I understand if you want to argue something even though it's against what you said throughout the case, which is no. This isn't about omission. This is about direct conduct. This is about directly doing something to people, having -- well, you know the language you've used.

And now saying well, this may have all been innocent, but here's another duty. This could be completely innocent, and now this is a duty that kicks in. That coming after the case is actually closed, after you're case is closed first raising that, I have concerns in that regard too.

It's just absolutely against everything you'd argued throughout the case in terms of purposeful, knowing, reckless conduct in the sense of conscious disregard -- knowing in that sense.

That's been your argument.

But I do find there is a duty. So that all these arguments can be made or -- again, I'm going to hear the defense. They want to argue that there is no duty at all. The defense was arguing this has all been omissions. And now, okay. Here's a duty based on omission. And the defense quarrels with that.

I'm just saying I understand the factual -- possible factual application of this. This instruction does not incorporate the required mens rea aspects of it.

MR. HUGHES: Your Honor?

THE COURT: Yes.

MR. HUGHES: To the extent it does not incorporate the mens rea, the state would request that the proposed instruction be given as modified to include a mens rea finding. And it could read that if the victim was helpless and in a situation of peril as a result of the defendant's action or result of defendant's use of an instrumentality under the control of the defendant, the defendant has a duty to render reasonable aid and assistance to the victim if you find the defendant knew -- the defendant knew of the victim's conditions of peril.

THE COURT: You've made a record, then, on the proposed instruction. And that addresses one aspect of it. And I'm trying to give correct instructions here that cover the facts. And I've had the argument, and I'll just have to make that decision this evening. But I want to talk about the -- what I believe --

MR. HUGHES: Your Honor --

THE COURT: -- has been shown with regard to duty.

Mr. Hughes.

MR. HUGHES: I'd cited to what I believe was the Peazy case. I was mistaken. The case that dealt with the due-process issue raised by the defense is State versus Puryear, P-u-r-y-e-a-r. That's 121 Arizona 359. And that's an appellate case from 1979. Again, that was the case I mistakenly called the "Peazy case."

THE COURT: Okay. So the other basis for finding duty. And then that would permit omission consideration -- you know -- not just voluntary act is -- the way it's been characterized here is a special relationship.

Mr. Kelly.

MR. KELLY: Judge, again, the record is clear.

129

We object to this entire duty analysis and why omissions would be relevant in arguing our client's guilt. So I'm not going to go back through that.

But now it's -- without waiving that argument, it's our position that if the Court has found the duty, then that establishes the notice requirement. And without waiving all the due-process arguments, then once it's established by the Court, it's not necessary to instruct the jury. We just proceed with the jury instruction that you have agreed upon thus far.

THE COURT: The way the cause statute reads is that if there is actual conduct or an action, then that can be a basis for criminal liability or if there is an omission of a duty imposed by law. So there still has to be some acknowledgment there was an addition imposed by law.

Now, if the state's original argument throughout this that this is all about positive conduct, there apparently would not need to be any reference to a duty the way the case has been conducted until the response to the Rule 20 motion.

I think that there always has to be a duty really even with active conduct. And I read the Gibson case again. It talked about

130

foreseeability only being a question for the jury. The Court should stay away from that in determining whether or not there is a duty. Justice Hurwitz said that all you should be considering as a court on whether or not there is a duty is a class of cases. With this class of case is there a duty? And let the jury sort out foreseeability.

I mentioned the argument before that has gone on among academics, people who study these things, and how there is a blurring of the concepts between proximate cause and duty because they're both somewhat based on the idea of foreseeability.

But anyway, the supreme court here has made it clear, courts decide issues of duty and juries decide questions of foreseeability. If the state's case is based on positive conduct, there really is no need to instruct on duty.

Mr. Hughes.

MR. HUGHES: Your Honor, that's correct. However, the state does wish to argue to the jury, which we believe is supported by the facts and the law, the omissions that the defendant engaged in in addition to his conduct.

And to that extent, the giving of a duty instruction is appropriate. The defendant did have

131

a duty. And the state would ask that the duty instruction that we've requested -- and I understand that the Court is considering the duty instruction that was listed on page 1 of our addendum. We would ask the duty instruction on page 2, the other duty instruction, also be given. It is supported by the restatement, third of tort, Section 41, and by the Gibson case and the cases cited in Gibson, Anteveros and Stanley.

THE COURT: Mr. Hughes, where did you get the language, "for other relationship that results in benefit to the defendant"? I tried to find that looking through the restatement, tried to look at Section 41, restatement of torts, regarding physical harm. I couldn't find that in that type of a statement. It seemed to be a summary of things.

Also I would really be hesitant to give to the jury an instruction that says a special relationship can be based on a contract with no instruction telling them what a contract is, how they determine the existence of a contract. In civil law you would instruct jurors on that kind of matter, not just turn that over for a common-sense, I guess, interpretation of what "contract" might

132

mean.

Mr. Kelly.

MR. KELLY: I'm sorry, Judge. Again, our position is that it's necessary for you to find a duty, and then we proceed as you defined. And we object to the finding of that duty. But if this instruction is going to be given, then we have another legal issue. And that is that there has not been substantial evidence provided during four months of testimony as to any contract between James Ray and the participants.

So, thus, necessarily this case, then, we would renew our Rule 20. Because all of the evidence in the case was a contract between the participants and James Ray International.

THE COURT: Well, the Court in Gibson said --

MR. KELLY: And, Judge, I have to add just for the record, obviously you've heard cross-examination and I think the little chart I had showing the distance between the individual, James Ray, versus the contractual relationship between JRI and the participants.

And had we known that the jury was going to be instructed on a contractual relationship, that would have impacted our defense strategy in

showing that either through cross-examination or the presentation of evidence that Mr. Ray was not contracting with these people.

I think of a civil arena in which if James Ray were to be held personally responsible for the injuries of the participants, it would be necessary to pierce the corporate veil and establish that relationship. And, of course, we approached this case based on the representations made by the state for almost over a year and a half.

And the final thing I would say given the time is they're estopped. The concept basic premise of estoppel prohibits them from arguing something different.

THE COURT: We've gone past the 90 minutes, so I'm going to give you my view. And it's really what I've stated before. And it came up when there was a discussion regarding the testimony of Mr. Sundling.

The duty of care is the normal duty of reasonable care. That's it. It's -- that's the duty. There is no special duty. There is no special conduct for a sweat lodge facilitator, as there is a for physician, lawyer, coach, other

occupations. There is a general duty to exercise reasonable care. That's the nature of the duty. And I don't think it goes beyond that.

The jury is going to decide with all this background information, was that reasonable conduct. And then once they get there, does it get to the next level that has to be shown to qualify for the charges. That's what I think. And I think that covers it. I don't think there needs to be any other elaboration on duty.

And with that, the state can argue omission. Because if there is a duty to act and there is an omission, that can be asserted.

Mr. Kelly.

MR. KELLY: Judge, we have one citation for you. Ms. Seifter in response to an earlier issue, we promised you a case.

THE COURT: Okay. Thank you.

MS. SEIFTER: Your Honor, this is with respect to the possible instruction on a knowing mental state. And I apologize. I've been sitting here. I haven't had an opportunity to exhaustively canvass the case law.

But we do believe that the instruction would violate the due-process clause, Sixth

Amendment, and the Fifth Amendment as a variance from the indictment. And with respect to the Sixth Amendment problem, the case that we'd like the Court and counsel to look at and that we will look at very closely is State v. Saunders, 205 Ariz. 208. It's from the court of appeals, 2003.

THE COURT: 205 Arizona 208?

MS. SEIFTER: That's right.

THE COURT: Thank you.

We've gone way past. I really wanted to talk about vicarious liability. My thought on that, again, is an instruction that emphasizes that it has to be the conduct of Mr. Ray and not the conduct of another person, I think, is appropriate. I have concerns with this particular form.

Mr. Hughes, first of all, do you agree with that proposition that there have been other people mentioned in doing things or not doing things, perhaps arguably?

And that's my concern, Mr. Kelly, also as an instruction. I thought about this throughout the case. Emphasizing it has to be the direct, actual conduct of Mr. Ray, not someone else. There cannot be vicarious liability.

MR. HUGHES: Your Honor, I think that concept

is addressed in the causation instruction together with the causation instruction that's being provided on multiple actors, which is 2.03.03.

And when those two instructions are read, obviously the first causation instruction makes it very clearly that the defendant has to be the cause of the result, which is the death. And then the causation for multiple actors makes it clear when the defendant is responsible or when he's not responsible, when you have the act of another actor involved.

So it's the state's belief that those two instructions adequately deal with this vicarious liability issue, which, again, would arise whenever you have a multiple-actor situation.

MR. KELLY: Judge, I can say very briefly three sentences. We believe the evidence elicited at trial requires a separate vicarious liability instruction.

THE COURT: The jury is coming back at 9:15, and I want to start as soon as we can. However, I'm not going to rush the instructions. More record needs to be made, that's what's going to happen. I'm going to work on, I hope, a much closer set of final instructions. I'm going to ask

that the attorneys be here by, say, 8:15.
MR. HUGHES: Your Honor, for tomorrow another instruction the state would ask the Court consider is the waiver instruction, which is on page 5 of the state's June 10 filing.
THE COURT: I saw the waiver, and I didn't see a -- the version I saw didn't have an authority for it.
MR. HUGHES: It didn't. Very briefly, the basis of that is it is supported by the absence of authority to the contrary. Waiver is, essentially, a justification defense. Apparently the statutes in Arizona dealing with justification are set forth in Title 13 and does not include waiver as a justification.
The law in Arizona is very clear that the criminal law is contained within its statutes. There is no law allowing a defendant to be justified in committing a crime when there has been a waiver by the victim. That's what this statute seeks to inform the jury.
THE COURT: Mr. Kelly, were you objecting to that?
MR. KELLY: We are, Judge. We believe -- you've heard the evidence. The waivers were to

point out the knowledge of the participants as to the activities, the inherent risks associated with those activities, et cetera. It's in writing. They're exhibits.
We never asserted -- we did not disclose under Rule 15 that -- some type of an affirmative defense or justification defense.
THE COURT: I would like to see the authority. I know there are sometimes propositions in law, it's just hard to find something. They're accepted. That's been my common notion of the law, that you can't waive -- a person can't waive criminal culpability or ask someone to do that, I guess -- a possible victim.
MR. KELLY: Judge, I can assure the state that's not our argument that somehow they waived a crime.
MR. HUGHES: Your Honor, the state's concern is that jurors who are laypersons when it comes to the law, when they go back to the jury room, may start wondering well -- you know -- they signed this waiver. Can we proceed?
If the defense is not arguing that the waiver is operative as a justification, then there is no harm to correctly instruct the jury that it

is not a justification.
THE COURT: Okay. Thank you.
(The proceedings concluded.)

STATE OF ARIZONA)
) ss: REPORTER'S CERTIFICATE
COUNTY OF YAVAPAI)

I, Mina G. Hunt, do hereby certify that I am a Certified Reporter within the State of Arizona and Certified Shorthand Reporter in California.
I further certify that these proceedings were taken in shorthand by me at the time and place herein set forth, and were thereafter reduced to typewritten form, and that the foregoing constitutes a true and correct transcript
I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.
In witness whereof, I have affixed my signature this 18th day of June, 2011.

MINA G. HUNT, AZ CR No. 50619
CA CSR No 8335

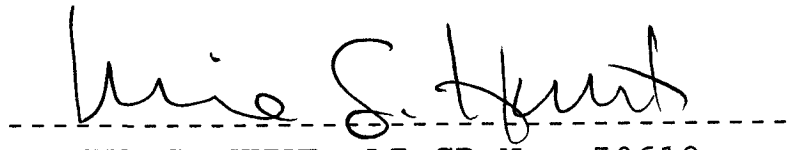
STATE OF ARIZONA)
) ss: REPORTER'S CERTIFICATE
COUNTY OF YAVAPAI)

I, Mina G. Hunt, do hereby certify that I am a Certified Reporter within the State of Arizona and Certified Shorthand Reporter in California.

I further certify that these proceedings were taken in shorthand by me at the time and place herein set forth, and were thereafter reduced to typewritten form, and that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

In witness whereof, I have affixed my signature this 18th day of June, 2011.



MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335